FILE COPY

Office Supreme Court, U.S.
FILED
NOV 14 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960.

No. 529

EARL C. SYLVANDER, MARGARET C. SYLVANDER, FRED L. EAMES, S. H. TERRY and JOHN O. YOUNG, individually and on behalf of all other stockholders similarly situated,

Appellants,

v.

FARMERS AND TRADERS LIFE INSURANCE COMPANY, LOUIS J. TABER, EDWIN W. HENNE, H. B. DOUST, HARRY A. CATON, ALVIN E. HANSON, GEORGE M. LEWIS, WALTER L. WEEDEN, D. EATON ALVORD, KENZIE S. BAGSHAW, HEATTY H. DIMIT, HARRY A. DUNSMOOR, FRED J. FREESTONE, CLARENCE E. JOHNCOX, JAMES B. KIRBY, B. BURDETTE LEE, GRANT T. LITTLE, HENRY D. SHERWOOD, BENJAMIN E. SHOVE, CLARENCE H. TWICHELL and HELEN E. HAYES, as Administratrix of Estate of LESTER D. HAYES,

Appellees,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

THE REPORTER COMPANY, INC., Walton, N. Y.—1960

Index.

	Page
Opinions Below	2
Jurisdiction	2
Statutes and Constitutional Provisions Involved	3
Questions Presented	3
Statement of Case	5
The Questions are Substantial	8

CITATIONS.

CASES:

American Railway Frog Co. v. Haven, 101 Mass. 398 (1869)	20
Anderson National Bank v. Luckett, 321 U. S. 233 (1944)	16
Backus v. Fort Street Union Depot Co., 169 U. S. 557 (1898)	16
Bowman v. Armour, 17 Ill. 2d 43, 160 N. E. 2d 753 (1959)	18
Bragg v. Weaver, 251 U. S. 57 (1919)	16
Brewster v. Hartley, 37 Cal. 15 (1869)	20
Burke v. Fidelity Trust Co., 202 Md. 178, 96 A. 2d 254 (1953)	16
Case v. Los Angeles Lumber Products Co., 308 U. S. 106 (1939)	17
Chaplin v. C. I. R., 136 F. 2d 298 (1943)	20
Coombes v. Getz, 285 U. S. 434 (1932)	23

Page

Department of Banking v. Pink, 317 U. S. 264 (1942) 3

Ex Parte Holmes, 5 Cowen (N. Y.) 426 (1826) 20

Farrington v. Tennessee, 95 U. S. 679 (1877) 15, 20

Hoopeston Canning Co. v. Cullen, 318 U. S. 313 (1943) 3

Huber v. Martin, *et al.*, 127 Wis. 412, 105 N. W. 1031 (1906) 16, 18

Lawrence v. I. N. Parlier Estate Co., 15 Cal. 2d 220 (1940) 20

Lord v. Equitable Life Assurance Society, 194 N. Y. 212 (1909) 16, 19, 20

Ohio State Life Ins. Co. v. Clark, 274 Fed. 771 (6th Cir. 1960), cert. den. 363 U. S. 828 24

People v. Hawkins, 157 N. Y. 1 (1898) 17

Phillips Petroleum Co. v. Jenkins, 297 U. S. 629 (1936) 23

Schwarzwaelder v. German Mutual Fire Insurance Co., 59 N. J. Eq. 589 (1899) 22

Strout v. Cross, Austin & Ireland Lumber Co., 238 N. Y. 406 (1940) 23

Wildermuth v. Lorain Coal & Dock Co., 138 Ohio St. 1, 32 N. E. 2d 413 (1941) 18

STATUTES:

Del. Code Ann., Title 8, Sec. 160 20

Mass. Gen. Laws Ann., C. 156, Sec. 31 20

Page

N. Y. Civil Practice Act, Sec. 473 2

New York Insurance Law, Sec. 199 ..... 2, 20

New York State Constitution, Art. 1, Sec. 6 ..... 3, 5

Ohio Rev. Code Ann., Sec. 1701.47 (Supp. 1957) 20

Pa. Stat. Ann., Title 15, Sec. 2852—508 20

United States Code, Title 28, Section 1257 (2) 3, 8

United States Constitution, Article 1, Section 10 ..... 2, 4, 5, 8

United States Constitution, 14th Amendment 2, 4, 5

MISCELLANEOUS:

Hornstein Corporation Law and Practice, Vol. 1, Sec. 498 (1959) 20

APPENDIX A:

Opinion of New York Supreme Court 1a

Judgment of New York Supreme Court 18a

Judgment of Appellate Division 26a

Judgment of New York Court of Appeals 28a

Amended Remittitur 30a

APPENDIX B:

Constitution of the United States, Art. 1, Sec. 10, Amend. 14 ..... 31a

New York Insurance Law, Section 199 ..... 31a

No. .....

October Term, 1960.

IN THE

Supreme Court of the United States

EARL C. SYLVANDER, MARGARET C. SYLVANDER, FRED L. EAMES, S. H. TERRY and JOHN O. YOUNG, individually and on behalf of all other stockholders similarly situated,

Appellants,

v.

FARMERS AND TRADERS LIFE INSURANCE COMPANY, LOUIS J. TABER, EDWIN W. HENNE, H. B. DOUST, HARRY A. CATON, ALVIN E. HANSON, GEORGE M. LEWIS, WALTER L. WEEDEN, D. EATON ALVORD, KENZIE S. BAGSHAW, BEATTY H. DIMIT, HARRY A. DUNSMOOR, FRED J. FREESTONE, CLARENCE E. JOHNCOX, JAMES B. KIRBY, B. BURDETTE LEE, GRANT T. LITTLE, HENRY D. SHERWOOD, BENJAMIN E. SHOVE, CLARENCE H. TWICHELL and HELEN E. HAYES, as Administratrix of Estate of Lester D. Hayes,

Appellees,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

Appellants appeal from the final judgment of the Court of Appeals of the State of New York entered in this action on May 19, 1960, affirming a judgment of the Appellate Division entered on January 6, 1960, which had affirmed a declaratory judgment of the Supreme Court of the State of New York dismissing the complaint herein entered in the County of Onondaga on May 7, 1959. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial constitutional questions are presented.

Opinion Below.

The opinion of the Supreme Court of the State of New York, Onondaga County, is reported in 19 Misc. 2d 1005, 188 N. Y. S. 2d 368.

The Appellate Division, 9 A. D. 2d 1019, 196 N. Y. S. 2d 592, and the Court of Appeals affirmed without opinion. Copies of the opinion and judgment of the Supreme Court of the State of New York, the judgment of the Appellate Division, and the judgment of the Court of Appeals are printed in Appendix A hereto.

Jurisdiction.

This action was brought pursuant to N. Y. Civil Practice Act, §473, for a declaratory judgment that the application of Section 199 of the New York Insurance Law to appellants violated their rights under (1) the obligations of contract clause of Art. 1, Sec. 10, of the United States Constitution; (2) the due process clause of the 14th Amendment to the United States Constitution; (3) the equal protection of the laws clause of the 14th Amendment to the United States Constitution; and (4) the due

process clause of Art 1, Sec. 6, of the New York State Constitution. The judgment of the Supreme Court of the State of New York, dismissing the complaint, was affirmed by the Court of Appeals of the State of New York on May 19, 1960. A notice of appeal was filed in the Supreme Court, Onondaga County, on August 16, 1960. On October 11, 1960, the time for appellants to docket the case and file the record on appeal was extended to November 15, 1960. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review on appeal the judgment in this case: *Department of Banking v. Pink*, 317 U. S. 264 (1942); *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313 (1943).

Statutes and Constitutional Provisions Involved.

Section 199 of the New York Insurance Law (Laws of 1939, Chap. 882), and the pertinent provisions of Article 1, Section 10, and the 14th Amendment to the United States Constitution are set forth in Appendix B.

Questions Presented.

The following questions are presented by this appeal:

1. Whether Section 199 of the New York Insurance Law, which authorizes a stock life insurance company to purchase all its outstanding capital stock and convert itself into a mutual life insurance company pursuant to a plan of mutualization which:

> (a) arbitrarily fixes for all time the price to be paid for all the shares, thus limiting the value of the shares to the price so fixed;

(b) does not provide a definite obligation for the company to pay the full purchase price;

(c) does not provide for a hearing to determine the fair value of the stock or a right of appraisal; and

(d) does not provide for judicial review; deprives dissenting minority stockholders of their property without due process of law in violation of the 14th Amendment to the United States Constitution,

2. Whether the 1939 amendment to Section 199 of the New York Insurance Law (formerly Sections 16 and 95), enacted after the issuance of the charter and of appellants' shares of capital stock of a stock life insurance company, which requires the price fixed by the plan of mutualization to be adhered to impairs the obligations of contract of dissenting stockholders of such company in violation of Article 1, Section 10, of the United States Constitution.

3. Whether the 1917 amendment to former Section 95 (now Section 199) of the New York Insurance Law which authorizes a plan of mutualization under which shares of a stock life insurance company purchased by it out of company earned surplus are transferred to voting trustees, who are empowered to vote the stock at stockholders' meetings, and to receive dividends declared thereon and hold them for the benefit of future policyholders impairs the obligations of contracts of dissenting stockholders in violation of Article 1, Section 10, of the United States Constitution, and deprives the dissenting minority stockholders of their property without due process of law in violation of the 14th Amendment to the United States Constitution.

Statement of the Case.

The amended complaint (hereinafter called the "complaint") in this action sought by declaratory judgment a ruling that the actions of the Farmers and Traders Life Insurance Company (hereinafter called the "Company"), and its individual officers and directors, in carrying out a plan to convert the Company from a domestic stock life insurance company to a mutual life insurance company pursuant to Section 199 of the New York Insurance Law violated appellants' constitutional rights as stockholders of the Company. The complaint set forth seven causes of action: The First and Fifth alleging a violation of Article 1, Section 10, of the United States Constitution; the Second Sixth alleging a violation of the 14th Amendment to the United States Constitution; the Third and Seventh alleging a violation of Article 1, Section 6, of the New York Constitution; and the Fourth alleging the acts of the defendants were *ultra vires*.

After a trial the Supreme Court of New York dismissed the complaint and filed an opinion with a detailed judgment which decreed in part (22a)*:

> "(p) That neither said plan (Exh. S-8) nor the formulation, promulgation nor carrying out of that plan now violates, or at any time has violated, any of the following constitutional provisions:
>
> "(i) The obligation-of-contracts clause of Art. 1, Sec. 10, of the United States Constitution;
>
> "(ii) The due-process clause of the 14th Amendment to the United States Constitution;
>
> "(iii) The equal-protection-of-the-laws clause of the 14th Amendment to the United States Constitution;
>
> "(iv) The due-process clause of Art. 1, Sec. 6, of the New York State Constitution;

* Page references are to the appendix hereto.

"(q) That none of the provisions of Sec. 199 of the Insurance Law as applied to the mutualization of Farmers and Traders Life Insurance Co. pursuant to said plan (Exh. S-8), and insofar as such provisions authorized said plan and the mutualization of Farmers and Traders Life Insurance Co. pursuant to said plan, is now, or at any time has been, in violation of any of the following constitutional provisions: [same as 'p' above]."

On July 12, 1912, pursuant to the Insurance Law of 1909, the Company was incorporated under the name of Farmers National Life Insurance Company to engage in the business of writing non-participating life insurance policies. Its name was duly changed to Farmers and Traders Life Insurance Company on September 17, 1914 (3a). On October 15, 1919, its charter was amended to authorize an increase of its capital stock from $200,000 consisting of 2,000 shares of the par value of $100 each, to $300,000 consisting of 3,000 shares of the par value of $100 each (3a).

The individual defendants are directors and/or officers of the Company. In January, 1953, a voting trust agreement was entered into between some of the present appellees for the purpose of soliciting stockholders of the Company to endeavor to convert the corporation from a stock company to a mutual life insurance company pursuant to Section 199 of the New York Insurance Law (3a).

On May 15, 1954, a plan of mutualization of the Company was adopted by a majority vote of the directors of the Company at a meeting thereof called for that purpose as required by Section 199 of the Insurance Law (4a). On June 17, 1954, a prospectus was mailed to all the shareholders of the Company, which provided for the issuance of voting trust certificates in accordance with the provisions of the voting trust agreement.

On July 19, 1954, the voting trustees, holding a majority of the shares of the outstanding stock of the Company voted approval of the plan of mutualization. Three of the appellants voted against this plan in person or by proxy (4a). On August 31, 1954, this plan of mutualization was then approved by a vote of the majority of the policyholders (who were eligible to vote) at a meeting called for such purpose as required by Section 199.

On September 14, 1954, the corporation submitted the plan to the Superintendent of Insurance for his approval without notice to stockholders. The insurance law makes no provision for the entertainment of objections by stockholders before the Superintendent of Insurance. Nevertheless, on October 14, 1954, three of the appellants appeared by attorneys and filed futile objections to the plan before a Deputy Superintendent (4a). On November 15, 1954, the Superintendent of Insurance approved the plan, which approval was not subject to judicial review (5a).

The plan in substance provided that the Company would purchase out of its surplus, the capital stock of the Company for $1,000 per share, payable as follows: an initial payment of $200 for stock acquired prior to December 31, 1954, $100 on January 1, 1955, and the balance in annual payments consistent with the ability of the Company to pay out of "normal earnings" from non-participating business only. Interest upon the balances was to be paid at the rate of 3% per annum out of the normal earnings (5a). Up to December 31, 1957, the Company had acquired 2,784 shares and had paid out $1,392,000 or $500 per share. The stock so acquired was paid for with Company assets, but instead of being designated treasury stock was transferred to the names of the appellees Taber, Henne and Newson, under the plan of

mutualization, as so-called "voting trustees." They have voted this stock at stockholders meetings, and dividends paid to them are being held for the benefit of future policyholders of the Company (23a-24a).

All such principal payments on the mutualization price and all payments of interest which have been made on the unpaid balances of the mutualization price have been paid from the accumulated net earnings of the non-participating business only, as said terms are defined in said Plan for Mutualization.

From the time of its incorporation and continuously until January 1, 1955, the Company issued only non-participating policies, the earnings from which belonged to stockholders. On that date the Company ceased writing non-participating life insurance policies and began writing only participating policies in the earnings of which the stockholders had no interest (23a). The appellees used accumulated earnings as well as earnings accruing after January 1, 1955, from non-participating policies to defray losses from writing participating policies to the extent of $570,599.30.

The Questions Are Substantial.

The decision of the Court below was based upon the specific grounds that the state statute, Section 199 of the New York Insurance Law, was not repugnant to Article 1, Section 10, and the 14th Amendment to the United States Constitution. This holding brings the case clearly within the jurisdiction of this Court under 28 U. S. C. §1257(2). The complaint was based principally upon alleged violations of the United States and New York constitutions. The opinion and judgment of the Court below shows that the case could not have been decided without passing on these federal questions (1a-25a). The amended remittitur of the New York Court of Appeals

specifically states that questions under the Constitution of the United States were presented and necessarily passed upon (30a).

As of June 30, 1960, there were 1,439 life insurance companies in the United States, of which 1,285 were stock companies, and 154 were mutual organizations (report of Institute of Life Insurance). At least eighteen states and the District of Columbia have mutualization statutes. Of these, eight provide for an appraisal to determine the fair value of the shares of dissenting stockholders.* New York is one of the states which do not provide for appraisal. A decision by this Court of the validity of the New York statute will be of great importance to all insurance corporations organized under the laws of non-appraisal jurisdictions. This is the first instance of conversion of a stock life insurance company to a mutual company in New York since the conversion in 1917 of the Equitable Life Assurance Society, so there has been no occasion to test the constitutionality of this statute.

* The following statutes provide for an appraisal: Illinois Revised Statutes (1951) Chap. 73, Section 647, Section 645; Ohio General Code, Section 9364-1 *et seq.* (R.C. 1953 Ch. 3913). Section 9364-2a; Oregon Compiled Laws Annotated (1940), 191-601 *et seq.*; Pennsylvania Act of April 20, 1921, P.L. 175, P.L. 179; South Dakota, Code of 1939, Sec. 31.1803 *et seq.* as added by Chap. 117, Laws of 1949 31.1804; Insurance Laws of Utah (1947), Sec. 43-8-7; 1950 Kentucky Revised Statutes, Sec. 304.144; Chap. 79, Sec. 08.08, par. (5); Insurance Code of Washington, 1947. The following statutes do not provide for an appraisal: California Insurance Code (1950), Chap. 13 as added by Statutes 1935, Chap. 30; Life Insurance Act of the District of Columbia (1934), Public 426-73rd Congress; 1941 Minnesota Statutes, Sec. 61.46, as added by Act of March 30, 1943, Chap. 231; New Jersey Revised Statutes (1937), 17:34-33 *et seq.* as amended by the Laws of 1940; Chap. 208; General Statutes of North Carolina (1943), Secs. 58-103 *et seq.*; Williams Tennessee Code Annotated, and 1949 Cumulative Supplement, Act IXB, Section §433.14 *et seq.*; Vernon's Texas Statutes (1948), Sec. 4871a; Indiana Burns Statute 1952, Replacement Sec. 39-4217; Louisiana Wests L.S.A. R.S. 22:806; prior to 1956 there was no provision for appraisal in the Virginia statutes, Chap. 317 Acts of 1952, Art. 7, Sec 38-489. This statute was amended in 1956 to provide for appraisal in certain circumstances.

1. The plan of mutualization deprives dissenting stockholders of vested rights.

In order that this Court may consider the three constitutional questions raised, appellants will describe the effect of the plan of mutualization on their rights as stockholders.

1. Prior to the effective date of the plan, January 1, 1955, the appellants owned shares in a successful stock life insurance company engaged in the business of writing non-participating policies.

2. From 1949 to 1955 the Company's earnings approximated $4,000,000. Due to a policy of paying out small dividends a large surplus and accumulated net earnings resulted.

3. Under the plan of mutualization authorized by Section 199, the directors of the Company fixed the price at $1,000 per share to be paid for all shares of stock. Dissenting stockholders were not entitled to a determination whether or not that price was fair value and no right of appraisal or judicial review was provided. The prospectus filed by the Company with the Securities and Exchange Commission stated: "Stockholders who retain their stock will not have any appraisal rights under New York State Law to receive the fair value of their shares."

4. The plan did not even provide a definite obligation for the Company to pay the full purchase price for the stock. In place of a share of stock participating in ownership of the assets of the Company, a stockholder was given a certificate of indebtedness. It provided only for a down payment of $200 per share, and future payments from time to time, only as authorized by the

Company, and only when there were sufficient funds available to cover payments. A period of at least 10 years was contemplated for the payments.

5. On January 1, 1955, the Company terminated its activities as a profit-making organization, ceased issuing new non-participating policies and began issuing only participating policies. All of the assets of the Company became the property of *future* participating policyholders, subject only to claims of non-participating policyholders as creditors (except for the accumulated net earnings described hereafter).

6. Payments for the stock were to be made *only* out of "accumulated net earnings," which meant surplus at the date of mutualization plus earnings from non-participating business *only*.

7. After the $1,000 per share is paid on *all* stock, the balance of earnings will belong to the participating policyholders.

8. During the years 1955, 1956 and 1957, assets and earnings from non-participating policies were used to cover losses on participating business resulting in a depletion of stockholders assets by the sum of $570,599.

9. The fund from which payments are to be made for stock may be so depleted that the $1,000 may never be paid. This may happen in the following ways:

(a) If losses on participating business continue to deplete earnings on non-participating business;

(b) The Company may persuade non-participating policyholders to convert to participating policies, thus ending earnings available for stock payments.

10. After January 1, 1955, dissenting stockholders were deprived of their vested rights in the assets, future earn-

ings and good will of the Company, and they could do nothing with their shares of stock except to surrender them to the Company in exchange for a certificate with a face value of $1,000, part of which might never be paid.

11. The only right remaining to the dissenting stockholders was the right to receive a dividend. But the directors who had the power to determine what dividends should be paid were not elected by other stockholders with financial interests similar to the dissenting stockholders. The majority of the stock which elected the directors was in the name of voting trustees who did not own the stock, and who were able to perpetuate themselves as directors.

2. The New York mutualization statute is constitutionally defective.

An examination of the history of the New York mutualization statute explains how the statutory scheme developed this constitutional defect.

The first mutualization statute was Section 95 of the Insurance Law, L. 1906, ch. 326. It permitted mutualization of a stock life insurance company through a plan approved by the directors, the shareholders representing a majority of the outstanding capital stock, and the policyholders insured for at least $1,000 and for at least one year. However, in 1911 the following provision was removed from Section 95:

> "Upon the approval of the said plan of retirement as aforesaid, said stock shall be retired and cancelled, and all right on the part of the holders thereof to vote thereon, or to receive dividends thereunder, shall cease, and the said stockholders shall be entitled to receive from the corporation, in lieu of their shares of said stock the amounts

> respectively payable to them in accordance with said plan of retirement, which shall be paid as therein provided. The propriety of said retirement and of the proceedings in connection therewith and the determination by said plan of the amount to be paid as the fair present value of the stock shall be subject to review at the instance of any party in interest, including a stockholder or policyholder, by the Supreme Court or any other court of competent jurisdiction."

In his 1917 Report, the Superintendent of Insurance explained that this part of Section 95 was excised because it implied that shareholders could be compelled to surrender their stock and obliged to accept whatever price the plan offered in violation of their constitutional rights. Since 1911 there has been no provision for judicial review. In 1911, Section 16 of the Insurance Law, which forbade insurance companies' buying their own stock, was amended to permit such purchases pursuant to a plan of mutualization (L. 1911, ch. 150). The Legislature enacted by L. 1917, ch. 301, a provision that all shares acquired by the company be held by three trustees for the benefit of the policyholders, and voted by them until all shares have been purchased.

The New York statutory scheme is inadequate. Its original objective was to avoid "compulsory" surrender of stock. Although the constitution does not prohibit the compulsory surrender of stock, it does require that when minority stockholders must surrender their stock they receive in its place its fair market value as appraised by an unbiased and independent judicial or administrative body. ***The New York law fails to provide either an appraisal or a judicial review.***

The reason the legislature deleted the above provision from Section 95 in 1911 was to eliminate the requirement for compulsory surrender. But the amendment in 1939

to Section 199 authorizing the Company to do what it has done in this case has in effect restored the compulsory features to the statute, forcing the stockholders to sell their stock at an arbitrary value contrary to due process of law.

In all of the other New York statutes where a corporation is allowed to take the stock of its stockholders without their consent, adequate safeguards of independent appraisal are provided so that a dissenting stockholder may receive a fair market value for his shares of stock.*

The substantial question presented is whether Section 199, although its purpose is to provide for a purely voluntary mutualization, is nevertheless unconstitutional because it authorizes a result which deprives stockholders of their vested rights just as much as compulsory surrender of the stock certificates.

3. Section 199 as applied deprives appellants of their property without due process of law in violation of the 14th Amendment.

In ruling that Section 199 did not deprive appellants of their property without due process of law the Court below relied on two premises: (1) since no stockholder was compelled to sell his stock, there was no compulsory taking,

---

* Insurance Law, Section 503 (merger or consolidation of a stock insurance company).

Stock Corporation Law, Section 105(9) (sale of assets in a voluntary dissolution).

Stock Corporation Law, Section 21, gives dissenting stockholder right to have an appraisal under the following:

1. Stock Corporation Law, Section 14 (issuance of stock to employees);
2. Stock Corporation Law, Section 20 (sale of all or substantially all of corporate property);
3. Stock Corporation Law, Section 85 (merger of corporations);
4. Stock Corporation Law, Section 86 (consolidation of domestic corporation);
5. Stock Corporation Law, Section 91 (consolidation of domestic and foreign corporations).

and no confiscation; (2) one of the vested rights attached to the shares was the "vested right to be mutualized" (14a-15a).

This raises the substantial federal question whether a state may deprive a stockholder of very substantial rights flowing from stock ownership so long as it does not compel him to surrender his stock certificate itself.

This Court has succinctly stated what the rights of stockholders are in *Farrington v. Tennessee*, 95 U. S. 679, 687 (1877).

Appellants contend that the New York legislature has failed to provide constitutionally legal machinery to accomplish the conversion of a stock company to a mutual company over the objection of dissenting stockholders. The 1906 statute required compulsory surrender of stock at a price fixed by a plan. In 1911 the compulsory provision was eliminated by the legislature because of doubts as to its constitutionality (58th Ann. Rep. of Supt. of Ins. March 1, 1917, Sen. Doc. #42 Par. 1, pp. 11-12). In 1911 the legislature amended Section 16 of the Insurance Law to authorize a stock insurance company to acquire its own shares (L. 1911, Ch. 150, pp. 240, 241). In 1917 Section 16 was amended to provide that shares acquired by a company should be assigned to three trustees, and held by them until all of the capital stock is acquired (L. 1917, Ch. 301, pp. 1023, 1024). In 1939 the legislature combined Sections 16 and 95 into Section 199 which was amended to provide *inter alia* "(e) Such plan may specify the purchase price to be paid by such company for shares of its capital stock, and in such case the price so specified shall be adhered to" (L. 1939, Ch. 882).

Neither Section 199 of the Insurance Law nor any other New York statute gives to a dissenting stockholder in a

mutualization of a stock life insurance company the right to be heard as to the fair value of his stock. The Superintendent of Insurance is empowered to determine whether the plan provides protection for *policyholders*, but he has no authority to consider or determine whether the price offered to stockholders is fair. The directors of the Company with the approval of 50.1% of the stockholders, have the sole power to determine the price to be paid to the 49.9% minority stockholders. There is no procedure for judicial review. This Court should determine whether the New York legislature has violated the due process clause of the 14th Amendment by failing to establish a reasonable procedure for determining the fair value at which shares may be purchased for retirement as part of a plan of mutualization.

Due process of law requires that a stockholder be afforded an opportunity to be heard on the question of fair value of his stock, and a right of appeal to the courts. *Anderson National Bank v. Luckett*, 321 U. S. 233, 246 (1944); *Burke v. Fidelity Trust Co.*, 202 Md. 178, 96 A. 2d 254 (1953). There is a close analogy between the rights of dissenting stockholders and the rights of real property owners whose property is condemned. In the condemnation cases a hearing and judicial review have been required. *Bragg v. Weaver*, 251 U. S. 57 (1919); *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557 (1898).

Nor does the power of a state to alter or amend a corporate charter change this in any way. The New York Court of Appeals itself recognized this in *Lord v. Equitable Life Assurance Society*, 194 N. Y. 212, 227 (1909). To the same effect, see also *Huber v. Martin, et al.*, 127 Wis. 412, 105 N. W. 1031, 1038 (1906).

Appellants' vested property rights as stockholders were diminished without their consent in the following ways:

(1) the Company ceased operating as a profit-making organization, with the object of gradually eliminating earnings;

(2) the stockholders were deprived of their interest in the assets and earnings of the Company (except for such meager dividends as might be declared). These assets were transferred to the participating policyholders;

(3) accumulated earnings belonging to stockholders were used to finance the business of issuing participating policies, in which the stockholders were given no interest;

(4) the authority given the voting trustees to vote treasury stock purchased with Company assets, deprived appellants of their proportionate vote for the election of directors.

The mutualization was in effect a dissolution of the Company, since it was intended to terminate its business, eliminate all stockholders, and operate as a non-profit mutual company. It was at least a "reorganization" which this Court has held cannot be used to shift property from one security holder to another. *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939).

One's property rights arising from stock ownership can be destroyed without the stock certificates ever actually being taken.

People v. Hawkins, 157 N. Y. 1, 7 (1898), expressed the guiding principle:

> "The citizen cannot be deprived of his property without due process of law. The principle embodied in this constitutional guaranty is not limited to the physical taking of property. Any law which annihilates its value, restricts its use, or takes away any of its essential attributes, comes within the purview of this limitation upon legislative power."

The decision of the Court below is contrary to *Huber v. Martin, et al., supra*. The facts were the reverse, but the principle is the same. There a statute authorized the conversion of a mutual life insurance company into a stock company. A policyholder of the mutual company objected to the conversion because the statute provided that the assets of the mutual company would become the property of the stock corporation, and not divided among the members of the mutual company. In holding that the policyholder could not constitutionally be deprived of its interest in the assets, the Wisconsin court stated:

> "• • • The right of the corporation to hold its property in harmony with that situation, and the rights of the members t have the same so held and administered were property interests resting on contractual obligations and so within the guarantee of the state constitution as regards the passage of laws impairing the obligations of contract, • • • and that of the national constitution as regards the deprivation of property without due process of law, or denying persons the equal protection of the laws." 14th Amend: U. S. Const.
>
> • • • • • •
>
> "• • • The act of the Legislature in question, in terms or in effect, authorizes the appropriation of the property of one private corporation and the equitable interests therein of the members thereof to the use of another private corporation and of its members in violation of the corporate charter rights of the former corporation, and in defiance of the wishes of such of its members as do not choose to consent thereto". (at p. 1040).

Another example of the destruction of a stockholder's rights, although the company did not take away his stock or his right to dividends, is *Wildermuth v. Lorain Coal & Dock Co.*, 138 Ohio St. 1, 32 N. E. 2d 413 (1941).

In *Bowman v. Armour*, 17 Ill. 2d 43, 160 N. E. 2d 753 (1959), a charter was amended by more than a two-thirds

vote of all classes of stock to provide that the directors were authorized to redeem the prior preferred stock at a price of $120 payable in 30-year debentures and warrants. The Supreme Court of Illinois upheld the contention of a preferred stockholder that the amendment deprived him of his property in violation of constitutional prohibitions.

In the case at bar, the assets and accumulated surpluses (subject to the payment of liabilities under outstanding policies), good will and earnings present and future, belong to the stockholders and cannot be diverted to future policyholders without the consent of all of the stockholders, absent any provision for appraisal of the stock of the dissenters.

In *Lord v. Equitable Life Assurance Society*, 194 N. Y. 212 (1909), it was held that an amendment which deprived the stockholders of the right to vote for all directors, although it gave them absolute power to elect 24 out of the 52, was invalid. The Court said the right of a stockholder to vote is a vested right of property which the Legislature could not by direct action essentially impair; nor could it do so indirectly by authorizing the directors with the consent of only a majority of the stockholders, to amend the charter so as to have that effect.

The provision of Section 199 which authorized the Company to purchase shares of its own stock out of earned surplus and transfer the shares to voting trustees who were empowered to vote the shares and receive dividends thereon for the benefit of future policyholders deprives dissenting stockholders of their property without due process of law.

The Court below erroneously held "that the stock does not become treasury stock until the plan is completed" (17a).

When the Company repurchased the stock under the plan it immediately became treasury stock. In *Hornstein Corporation Law and Practice*, Vol. 1. Section 498, at page 625 (1959), it is stated "the term 'treasury shares' is applied to shares which have been issued and thereafter reacquired by a Corporation, but not retired or restored to the status of unissued shares."

It has long been established that a corporation cannot vote directly or indirectly, stock of which it is the owner and irrespective whether it is in its hands or that of trustees. *Farrington v. Tennessee*, 95 U. S. 679, 687 (1877); *Lawrence v. I. N. Parlier Estate Co.*, 15 Cal. 2d 220, 231 (1940); *Brewster v. Hartley*, 37 Cal. 15 (1869); *Ex Parte Holmes 5 Cowen* (N. Y.), 426 (1826); *American Railway Frog Co. v. Haven*, 101 Mass. 398, 402 (1869). This has been frequently reaffirmed by statute. Del. Code Ann. Tit. 8, Sec. 160; Mass. Gen. Laws Ann., C. 156, Sec. 31; Ohio Rev. Code Ann., Sec. 1701.47 (Supp. 1957); Pa. Stat. Ann. Tit. 15, Sec. 2852-508.

Section 199(3) of the N. Y. Insurance Law itself recognizes that this treasury stock is an "admitted asset of the company." A corporation is not allowed to pay dividends on this treasury stock. *1 Hornstein Corporation Law and Practice*, Sec. 498, page 625 (1959); *Chaplin v. C. I. R.*, 136 F. 2d 298, 302 (1943).

Apart from statute then, the corporation could not transfer the beneficial ownership of this stock to third persons, i. e., the policyholders, without receiving adequate consideration. No consideration was given. Neither could it pay dividends on this treasury stock or vote it. In *Lord v. Equitable Life Assurance Society*, 194 N. Y. 212, 229 (1909), the Court stated that:

> "As the property of stockholders cannot be taken away either in whole or in part, it follows that the gift of any right so connected with their property as to be essential to its preservation and existence, would be a violation of primary rights."

Such actions would be subject to a stockholder's derivative action and could be set aside because a stockholder's property was being taken illegally. Here, however, all of the corporation's action which has been taken has been sanctioned by Section 199 and consequently objecting stockholders have no right of action.

In 1955, 1956, 1957 and 1958, the corporation has paid a dividend of $15 per share for each share of stock held in trust for the benefit of future policyholders of the company. These dividends rightfully belonged to the stockholders.

The Legislature by creating this trust from the assets belonging to the stockholders of the corporation for the benefit of future policyholders has arbitrarily taken the property of the stockholders without giving them the corresponding right of appraisal. Such a statute deprives the stockholders of their property without due process of law and consequently violates the 14th Amendment.

4. Section 199 as applied impairs the obligations of appellants' contracts in violation of Article I, Section 10 of the Constitution.

The Court below held that Section 199 in authorizing the plan of mutualization did not violate Article 1, Section 10, of the Constitution. The Court below concluded that since mutualization as an organic structural change was possible under the law as it stood when the Company

was incorporated in 1912, the subsequent statutory amendments in 1917 and 1939 did not impair appellants' contract rights, as the "seeds of mutualization" existed at the time the stock was issued (12a-13a).*

The statute as it existed in 1955 is substantially different from the way it stood in 1912 when the stock was first issued and contract rights created. In 1912 there was no statutory authority to fix the price of the stock of dissenting stockholders. Such authority was first given by the legislature in 1939. This was the first time that statutes provided that the price specified by the company in the plan must be adhered to.

The purpose of this amendment was to force recalcitrant stockholders to sell their stock to the company (see Ins. Dept. Revision Note, 1937 Tentative Draft).

The Court below felt that the legislature had the reserved power to amend the law and through it the charter, without impairing contract rights of stockholders (10a). It considered the amendments of 1917 and 1939 as "relating to the internal management of the corporation, and, therefore, particularly subject to legislative alteration" (12a).

In *Schwarzwaelder v. German Mutual Fire Insurance Co.*, 59 N. J. Eq. 589 (1899), defendant was incorporated as a mutual insurance company in 1893. Plaintiff became a policyholder in 1898. In 1899 the law was amended whereby a mutual company could be changed to a joint stock company by a vote of the majority of its members. Defendant sought to become a joint stock company. Plaintiff objecting brought a suit to enjoin it. The Court

* The Court noted that there was an increase in capital stock in 1922, and that there was no proof as to when appellants' stock was purchased. However, the Court decided to base its decision on the law in effect at the time of issuance (13a).

granted the injunction because the proposed change would deprive the complainant of her membership in the company. It stated at page 594:

> "The complainant's right to membership was one of the benefits accruing to her from her contract of insurance in the company. Of this benefit the company had no power to deprive her, except in the mode provided by the contract itself. The act of March 6th, 1899, if enforced against the complainant, would impair the obligation of her contract by enabling the company to take from her a right derived from her contract with it, in a method not authorized by the contract. Such a law would be unconstitutional and void. *Although the act under which the company was organized is subject* to *amendment, alteration* and *repeal* by the *legislature*, yet such amendment, alteration or repeal can be affected only by the legislative power of that body, and its legislative power does not extend to the enactment of a law which impairs the obligation of a legal contract previously made." (Italics supplied.)

The reserved power of the state to alter, repeal or amend a corporate charter or statutes affecting such charters is not unlimited and its exercise is subject to the restrictions and restraints imposed by the other provisions of the State and Federal constitutions. Due process of law must be observed, and vested property rights and the obligations of contracts must not be destroyed or impaired. *Coombes v. Getz*, 285 U. S. 434 (1932); *Phillips Petroleum Co. v. Jenkins*, 297 U. S. 629 (1936).

Appellants' stock is a contract between the corporation, the other stockholders and appellants. In *Strout v. Cross, Austin & Ireland Lumber Co.*, 283 N. Y. 406, 413 (1940), the Court stated:

> "The certificate of stock is the muniment of the shareholder's title, and evidence of his right. It expresses the contract between the corporation and his co-stockholders and himself; and that contract cannot, he being unwilling, be taken away from him or changed as to him without his prior dereliction, • • •"

The most recent case dealing with this problem is *Ohio State Life Insurance Co. v. Clark*, 274 F. 2d 771 (6th Cir. 1960), certiorari denied 363 U. S. 828. In that case the corporate charter of a stock life insurance company, which issued non-participating policies and also policies on the mutual plan, gave the mutual policyholders a right to the beneficial interests in the surplus, subject to prior limited claims of stockholders. Subsequently the stockholders proposed an amendment to the corporate charter which would diminish the mutual policyholders' rights to the surplus.

The Court of Appeals affirmed the decision of the Trial Court that the proposed amendment would amount to a deprivation of vested property rights of the policyholders and held (p. 778):

> "The rights which the appellees have in the surplus of Columbus Mutual are protected by Article I, Sec. 10, of the United States Constitution which prohibits the impairment by a state of a contract obligation. It is not a question of degree; under the Constitution it is not to be impaired at all. *Bank of Minden v. Clement, Adm'x*, 256 U. S. 126, 41 S. Ct. 408, 65 L. Ed. 857. In our opinion, *the proposed amendment by the stockholders, acting under the power of corporate amendment conferred by the legislature, would be an impairment of the contract obligations of the corporation running to the appellees.*" (Italics supplied.)

By their contracts with the corporation plaintiffs had a right to sell their shares to the corporation at their

fair value. With the subsequent amendment in 1939 the Legislature by allowing the corporation to fix an arbitrary value on the stock impaired plaintiffs' contractual right to obtain the fair market value for their shares.

The New York court has held that the statute authorized the defendants to convert the corporation from stock to mutual, and to fix an arbitrary value of $1,000 per share for appellants' stock, regardless of its true value. The defendants were authorized to confiscate all of the income and appreciation in value over and above $1,000 per share. This Court should determine whether such action violates appellants' constitutional rights.

We believe the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

Joseph W. Burns,
AUSTIN, BURNS, APPELL & SMITH,
535 Fifth Avenue,
New York 17, New York,

Laurence Sovik,
SMITH and SOVIK,
300 Wilson Bldg.,
Syracuse 2, New York,
Attorneys for Appellants.

APPENDIX A.

Opinion of New York Supreme Court.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ONONDAGA.

EARL C. SYLVANDER, *et al.*,
Plaintiffs,

against

LOUIS J. TABER, *et al.*, and FARMERS AND TRADERS LIFE INSURANCE COMPANY,
Defendants,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Intervening-Defendant.

Opinion of Justice William E. McClusky dated April 15, 1959, reported in 19 Misc. 2d 1005, 188 N. Y. S. 2d 365.

This is an action for a declaratory judgment. The amended complaint herein sets forth some seven causes of action in sixty-four numbered paragraphs. Neither the amended complaint nor the answer are notable examples of conciseness. But the general purport of the complaint is to secure a declaration that Section 199 of the Insurance Law of this state, insofar as it is sought to be applied to the stockholders of the Farmers and Traders Life Insurance Company, is unconstitutional.

The problems involved in this litigation have been before the courts since 1953. The various phases are revealed in *Young vs. Taber, et al.*, 284 A. D. 829, aff. 308 N. Y. 647; *Matter of Young relative to Farmers & Traders Life Insurance Company*, 285 A. D. 117; *Matter of*

Young vs. Taber, et al., 306 N. Y. 888, and *Sylvander, etc., vs. Taber, et al.*, 6 A. D. 2nd 987. The sequel of the action of *Young vs. Taber, et al., supra*, was an order by this Court entered March 11, 1959, dismissing that action for failure to prosecute for several years.

The background of the matters which form the basis of this action reach back into legal history. The Supreme Court of the United States ruled in the case of *Trustees of Dartmouth College vs. Woodard*, 4 Wheaton 518, that a state cannot impair the obligations of a contract. The contract therein was the charter granted by the State of New Hampshire to the college. The charter, or the law under which it was granted must contain the reservation of the power to alter or amend or revoke. Following that decision the constitutions of the various states contained such a reservation (Article X, Section 1, Constitution of 1938). The section in question provides for the formation of corporations under general laws. The pertinent clause reads as follows:

> "All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

That same provision was in the constitution of 1894 (Article VIII, Section 1). That was the constitution in effect when the Insurance Law herein questioned was enacted.

In the latter part of 1912, pursuant to the provisions of the Insurance Law of 1909, The Farmers National Life Insurance Company was incorporated. Its authorized capital stock was two hundred thousand dollars with an issue of two thousand shares of the par value of one hundred dollars each. It was to engage in the business of writing non-participating life insurance policies or annuities.

Later and in August 1914 an application was made to the Supreme Court for an order to change its name to The Farmers and Traders Life Insurance Company. The order then granted provided for the change of name to become effective on September 17th, 1914. It is still known by the name then adopted.

Some time later in the year 1919 further amendments to the charter took place. One not pertinent to the causes herein related to the classification and election of directors. The second one dealt with a proposed increase in the amount of capital stock from two hundred thousand dollars to three hundred thousand dollars and in number from two thousand to three thousand, the par value remaining the same. This was finally achieved October 15, 1919. It is worthy of note that one of the prime movers in all these changes was one Thomas O. Young, father of John O. Young, one of the plaintiffs herein and one of the individuals from whom John O. Young secured the stock he presently possesses.

Thereafter and on or about August 1922 a further change was made in that the charter was amended to extend the field and type of policies to be issued.

In January 1953 a voting trust agreement was entered into between some of the present defendants for the purpose of soliciting stockholders of the company to endeavor to convert the corporation from a stock company to a mutual life insurance company pursuant to Section 199 of the Insurance Law. The effect of the decision in *Young vs. Taber, et al., supra;* was an affirmation of the validity of the voting trust agreement. The legal effect has become a factual admission by the stipulation entered into prior to the trial herein.

Section 199 of the Insurance Law in sub-section 2 thereof provides for mutualization. Four approvals must be obtained before any mutualization plan may become effective. First, it must be approved by a majority vote

of the board of directors; secondly, the plan must be approved by a majority vote of the outstanding capital stock at a meeting of the stockholders called for that purpose; thirdly, the plan must have been approved by a majority of the policyholders eligible, i. e., who have had a policy for at least one thousand dollars and which has been in force for at least one year before the voting date, and who are present either in person or proxy and vote or vote by mail; fourthly, the plan shall have been submitted to the Superintendent of Insurance of this state and shall have been approved as to conformity with the requirements of the chapter and not prejudicial to the policyholders and the insuring public. There are other specific features, detailing further procedures which are not pertinent in this stage of our examination. Admittedly a majority vote of the board of directors in favor of the plan was cast at a special meeting of the board called for that purpose on May 15, 1954. Thereafter a special meeting of the stockholders was held on July 19, 1954 to discuss the plan. A majority of the stockholders voted in favor of the plan. The present plaintiffs Earl C. Sylvander, Margaret C. Sylvander and John O. Young participated in the meeting and voted against the plan.

The next step was the approval by the policyholders. There were about fifty thousand at the time. Upon the voting day seven thousand seven hundred and four eligible policyholders were present and seven thousand and ninety-eight voted in favor of the plan and six hundred and six voted against it.

On September 14th, 1954, the Corporation submitted the plan to the Superintendent of Insurance for his approval. On October 11, 1954, John O. Young as a policyholder and stockholder and the Sylvanders as stockholders appeared by attorneys and filed objections to the plan. A lengthy hearing was held before one of the Deputy Superintendents, deputized for the purpose. It is again

worthy of note that three of the plaintiffs who maintain the unconstitutionality of Section 199 of the Insurance Law vigorously participated in the processes and procedures of that very section. After a lengthy hearing upon the subject the Superintendent of Insurance approved the plan of mutualization on November 15, 1954 in accordance with the required procedure.

The plan of mutualization provided that upon complying with the formal requirements of Section 199 aforesaid the stockholders would each receive one thousand dollars for each share of stock surrendered to the Mutualization Trustees, named in the plan, in installments. A Mutualization certificate would be issued to each stockholder surrendering his stock. Provision was made for the payment of an initial sum of two hundred dollars and the payment of the balance over a period of about ten years. Interest upon the balances was to be paid at the rate of three per cent per annum. The funds to meet the commitments were to be derived from the accumulated net earnings of the non-participating business only. The accumulated net earnings "as defined" "shall be the surplus to policyholders as reported in the Company's annual statement as of December 31, 1953 plus the net earnings on non-participating business thereafter less any principal payments made to the stockholders." The manner in which net earnings on non-participating policies was to be determined was set up in detail.

From the evidence submitted, it appears that Earl C. Sylvander is the holder at this time of seventy-nine shares of stock acquired at intervals from June 10, 1953 up to August 2, 1957 at prices ranging from about $200.00 per share up to in excess of $1,000.00 per share. His wife and co-plaintiff was and is the owner of two shares acquired June 10, 1953. Saydie H. Terry is the owner of two shares purchased November 22, 1944. John O. Young is the owner of seventy-four shares of stock acquired be-

tween January 19, 1934 and April 15, 1953. Most of his stock was acquired through two estates, wherein the stock in question was valued at about two hundred and twenty dollars per share. The number of shares surrendered to the trustee amounted to two thousand seven hundred and eighty four but the plaintiffs own in excess of five per cent of the stock. The plaintiffs have executed a voting and sale trust agreement designating as irrevocable proxies Lawrence Sovik (not the named plaintiff) and Harlow Ansell.

Summary statements of the business of the Company are in evidence. They reflect the expected condition upon the transition from non-participating to participating policies. The fund set aside to pay off the surrendered stock under the mutualization plan has likewise increased.

During the course of the trial, objections were made to the statements and exhibits offered. To facilitate the trial, the Court reserved decision upon the objections interposed. The objection to statement 14 setting forth the number of policyholders at the time of mutualization is overruled.

An objection was interposed as to the materiality and relevancy of statement No. 8 with its supporting exhibit. Whether or not the trustees under the voting trust agreement mailed a prospectus to the stockholders is irrelevant to the issues of this case. The objections are accordingly sustained, for the parties have conceded the validity of the voting trust agreement and misrepresentation is not an issue in this action.

The objection to the tenth statement is likewise sustained. In view of the concession made as to the trust agreement, the statement of fact has no relevancy. Objections to two exhibits dealing with communications relative to the hearing before the Superintendent of Insurance are sustained. Exception may be deemed to have been made *nunc pro tunc*.

The seven causes of action attack Section 199 of the Insurance Law from the viewpoint of the Federal Constitution and its several amendments and the State Constitution. Four of the causes of action are Federally based and three are founded on claimed state violations.

The basic objection is that Section 199 aforesaid impairs the obligation of the contract, existing between the Corporation and the State.

Article 1, Section 10, of the Constitution of the United States provides as follows:

> "No state shall * * * pass any * * * law impairing the obligation of contracts."

It is argued by the plaintiffs that the mutualization of the company was an impairment of a contract. Therefore, the plaintiffs conclude Section 199 of the Insurance Law is unconstitutional and invalid. What contract was impaired? Was it the charter creating the Corporation? Or was it the share of stock issued to the stockholder, plaintiff or defendant?

A corporation is defined as any group of persons treated by law as a person or unity having rights or liabilities distinct from the persons or objects composing it (cf. Webster's International Dictionary, Second Edition). There are three general classifications of corporations recognized in this state (Section 2, General Corporation Law). But no matter what the classification each has a charter. A stock corporation is defined as a corporation having shares of stock and which is authorized by law to distribute dividends to the holders thereof (cf. Sec. 3, subd. 5, General Corporation Law). In the same section, subd. 14, is incorporated the definition of a "certificate of incorporation." It includes articles of association or any oth written instruments required by law to be filed to create a corporation. It should be noted the specific powers and limitations are set forth in the

certificate of incorporation. By general statutes corporations have such general powers and rights set forth therein, whether or not specifically set forth in the charter. There is incorporated therein any limitations or conditions as may be in the Constitution of the State of New York. Whether set forth in so many words or not, the seeds of mutation are embedded constitutionally in every corporate charter issued by this state (cf. Article X, Section 1, State Constitution).

The mere fact that a law or an amendment may radically alter the corporate business does not render such change invalid. Changes made by the Prohibition Amendment are still fresh in the minds of the public. The stock certificate is not the charter. It is a contract between the corporation, the other stockholders and the stockholder himself. "It is the muniment of his title and evidence of his right" (*Strout vs. Cross, Austin & Ireland Lumber Company*, 283 N. Y. 496).

A share of stock carries with it the right to dividends, if any be declared, and in the event of dissolution, the right to a proportionate share in the net distributable assets.

The very argument adduced by the plaintiffs is based upon the assumption that its charter recognized the right to change but seems to hold that any changes made must be within the literal framework of the Insurance Law of 1911.

Two sections of the Insurance Law of 1911 are applicable. Section 95 provided as follows:

> "Sec. 95. Conversion of stock life insurance corporation into mutual life insurance corporation. Any domestic stock life insurance corporation, whether incorporated under the general law or by special act, may become a mutual life insurance corporation, and to that end may carry out a plan for the acquisition of shares of its capital stock, provided,

however, that such plan (1) Shall have been adopted by a vote of a majority of the directors of such corporation; (2) shall have been approved by a vote of stockholders representing a majority of the capital at a meeting of stockholders called for the purpose; (3) shall have been approved by a majority vote at a meeting called for the purpose, in such manner as shall be provided for in such plan, of policyholders each insured in at least one thousand dollars and whose insurance shall then be in force and shall have been in force for at least one year prior to such meeting; and (4) shall have been submitted to the superintendent of insurance and shall have been approved by him in writing, provided that such plan shall not be approved by the superintendent unless at the time of approval the corporation, after deducting the aggregate sum appropriated by such plan for the acquisition of all its capital stock, shall be possessed of assets sufficient to maintain its deposit theretofore made with the superintendent and not less than the entire liabilities of the corporation, including the net values of its outstanding contracts computed according to the standard adopted by the corporation under section eighty-four of this chapter, and also all funds, contingent reserves and surplus save so much of the latter as shall have been appropriated under such plan.

"All acts or parts of acts inconsistent with this act are hereby repealed."

Section 16 of that law as it then existed provided as follows:

"Sec. 16. Investment of capital and surplus. • • • but no such funds shall be invested in or loan on its own stock or the stock of any other insurance

corporation carrying on the same kind of insurance business, provided that, if a stock life insurance corporation shall determine to become a mutual life insurance corporation, it may, in carrying out any plan to that end under the provisions of section ninety-five of this chapter, acquire any shares of its own stock by gift, bequest or purchase."

This company was incorporated as a stock insurance company in 1912. Under the legal principles previously stated the right to mutualize the company existed by law. The right was accorded by section ninety-five of the law. It is elementary in any consideration of the constitutionality of a statute that the implementing statutes of a constitutional grant of power have the constitution's language as their framework or guide, whether expressed or not. "The legislature has the reserved power to so amend the law under which a charter has been taken out as to carry with it a corresponding amendment of the charter itself, either directly or by authorizing the corporation to make the change." *Lord vs. Equitable Life Assurance Society*, 194 N. Y. 227.

Mutualization as an organic structural change was possible under the law as it stood when the Farmers and Traders was incorporated. It has not been changed in any way by any of the amendments since 1911. The same safeguards that existed in 1911 exist in 1959. The same steps must be taken as in 1911. This Court agrees that no act of the legislature can take the private property of another without his consent and give it to another (*New York & Oswego Midland Railroad Company vs. Van Horn*, 57 N. Y. 473).

The case just cited is authority actually for the proposition that a contract previously invalid cannot be subsequently validated by the legislature to the detriment of the individual. The converse is, therefore, true viz: that a valid contract containing implicitly the reservation to

alter, change or repeal, may be changed licitly later. It follows, therefore, that the charter granted by the State of New York to the Farmers and Traders Life Insurance Company could be altered or modified by changes in the statute.

Section 70 and Section 95 of the Insurance Law as it existed in 1912 must be read together. Section 70 does not impose rigidity upon charters granted under it. The whole act must be read together. When so read it is clear that even though established as a stock company the Insurance Company could mutualize.

> "Acts which do more than regulate and control the internal management of a corporation, so far as it has relation to the public and concerns the policy of the state, are within the power to alter and repeal, even though the exercise of the power, adds to the burden of the stockholder by increasing his liability or diminishes the value of his stock or changes the name, offices or proportion in management and control of the corporation."
>
> *Hinkley v. Schwartzchild and Sulzberger* (95 N. Y. S. 363).

Again the same principle is restated in *McNulty vs. W. & J. Sloane*, 184 Misc. 835, where the Court stated:

> "Our Courts have held generally that the 'reserved power' extends not only to the contract between the corporation and the state but to the contract between the corporation and the stockholders or between the stockholders *inter sese*. Accordingly to the majority view, all the elements of the contract between the shareholders with reference to their interest in the corporation and to its internal management, may be altered by amendment

to the charter, as being within the conditions upon which the state grants the privilege of corporate existence."

Section 16 of the Insurance Law 1911 (*supra*), provided for the acquisition of stock of an insurance company upon mutualization. There is nothing abhorrent in such a provision. Subsequently the law was amended to provide more in detail how the stock was to be handled pending final mutualization. The general prohibition in the first part of the section was limited by the proviso. Evidently the Legislature recognized the existence of a potential problem and tried to meet it. At its worst it was a provision relating to the internal management of the corporation and, therefore, particularly subject to legislative alteration. By no stretch of the imagination did it constitute an impairment of any contract between the State and the corporation or its stockholders.

A further pertinent fact should be noted. The stock of the corporation was increased fifty per cent on October 19, 1922. But Section 16 of the Insurance Law had been amended by Chapter 301 of the Laws of 1917. The substance of the amendment is incorporated almost in its verbal integrity in subsection 3 of the present Section 199 aforesaid. It is well settled law that

> "Statutes in existence when the stock is issued • • • are, however, a part of the contract and if such statutes authorize a change, then any seemingly absolute statement of such rights in other parts of the contract necessarily is to be read as subject to the changes so authorized and such rights cannot properly be described as 'vested' in any sense which implies that they are not subject to such changes."
>
> *Zobel vs. American Locomotive Co.*, 182 Misc. 323.

What part, if any, of the shares held by the plaintiffs herein constituted part of the original issue and what portion were of the new issue, does not appear. But from the observations previously made, the additional issue would certainly be subject to all the provisions of sections sixteen and ninety-five of the Insurance Law then in existence. It is not necessary to consider the argument that the law in effect when purchased controls. Sufficient it is to determine that the law in effect at time of issuance controls, containing as it did the seeds of mutualization.

This Court accordingly declares that the defendants were within their rights in proceeding to mutualize the Farmers and Traders Life Insurance Company and that Section 199 of the Insurance Law of this state, authorizing a plan of mutualization did not and does not violate that portion of Article I, Section 10, of the Constitution of the United States, which provides "No state shall * * * pass any * * * law impairing the Obligations of Contracts."

The second cause of action is based upon an alleged violation of the Fourteenth Amendment of the Constitution of the United States. The complaint alleges, of course, a taking of plaintiff's property without due process of law. That taking must be established by clear and convincing proof.

> "To justify the court, however, in declaring a statute invalid, the conflict between the act and the Constitution must be clear and certain. Every presumption favors the validity of the statute. If there is a reasonable doubt, the Act should be upheld."
>
> *Fearon vs. Treanor*, 272 N. Y. 268;
> *Gardner vs. Ginther*, 232 App. Div. 296, affd. 257 N. Y. 578.

What is the property, if any, of which the plaintiffs have been deprived? Their shares entitle them to divi-

dends, the right to vote at annual and special elections, and to an aliquot distribution of the net assets of the corporation upon dissolution. Section 199 aforesaid does not deprive them of any of those rights. In fact the plaintiffs have been most diligent in exercising some of them. The very "right" to be a stockholder was conditioned by section ninety-five aforesaid. How can they be deprived of something, which they had and have, viz, the right to be mutualized? No stockholder in an insurance company is under any illusion. He knows or should know that his stock may be mutualized by the very law which gave the insurance company being. The enactment of amendments to the statute did not impair any contract with the corporate entity or the stockholders. (*Zobel vs. American Locomotive Co., supra.*)

The prototype of section 199 was in existence in 1912 in sections sixteen and ninety-five of the then Insurance Law. Insurance business is a different type of business than the ordinary. The two types of general insurance business were and are well known.

> "The power reserved to the State to alter corporation laws and charters is specific and ample warrant for this legislation." (Section 199.)
>
> (*Garzo vs. Maid Of Mist Steamboat Co.*, 303 N. Y. 516.)
>
> (*Close vs. Glenwood Cemetery*, 107 U. S. 466.)

To argue that the enactment of section 199, *supra* was an interference with the "vested rights" of the plaintiffs is a complete begging of the question. All the rights of the plaintiffs to vote are in a sense vested. So too is the right to dividends and to distribution of net assets upon dissolution. But attached to the share of stock in an insurance company in this state is the "vested right" to be mutualized. Under varying conditions, it may not be as

pleasant a right to exercise as that of receiving dividends, but it is, nevertheless, a right of the stockholder. (*Davison vs. Parke, Austin & Lipscomb, Inc.*, 285 N. Y. 500.)

A somewhat similar situation was presented in *Jay Ronald Co., Inc., vs. Marshall Mortgage Corporation*, 291 N. Y. 227. There the capital stock was reduced from three hundred thousand dollars to one hundred thousand dollars; the sum realized was allocated to surplus. The plaintiff maintained his vested rights had been interfered with and that the two hundred thousand dollars should be repaid to the stockholders. The Appellate Division agreed but the Court of Appeals held otherwise.

Again this court reiterates that no stockholder is compelled to sell his stock under the provisions of section 199 of the Insurance Law. That is entirely in the discretion of the owner of the stock. There being no compulsory taking, there is no confiscation. This Court, therefore, declares that the defendants were within their rights in carrying through the proposed mutualization and that section 199 of the Insurance Law of this state is not in violation of the Fourteenth Amendment to the Constitution of the United States.

The third cause of action claims that section 199 aforesaid violates Article 1, section 6 of the State Constitution which provides "no person shall be deprived of • • • property without due process of law." At the time of the incorporation of the Farmers and Traders Life Insurance Company, in addition to the article of the constitution previously mentioned, there was a provision of the General Corporation Law applicable to all corporations, which reads as follows:

> "5. Alteration and repeal of charter. The charter of every corporation shall be subject to alteration, suspension and repeal, in the discretion of the Legislature."

Any proprietary interest in a corporation carries both the constitutional and legislative warning with it. From the principles previously discussed, it follows that there was no taking of the plaintiffs' property without due process of law. The different treatment accorded to insurance companies has a valid and reasonable basis in practice. (*German Alliance Insurance Co. vs. Lewis*, 233 U. S. 389; *Matter of International Workers Order*, 199 Misc. 941, affd. 305 N. Y. 258.)

This Court declares, therefore, that section 199 of the Insurance Law is valid under Article I, section 6, of the State Constitution and that the contention of the plaintiffs that it is invalid because it allegedly violates that section is without merit.

The claim that the acts of the officers and directors were *ultra vires* is based upon the assumption that section 199 and especially subdivision 3 thereof is unconstitutional. Having heretofore decided contrary to the assumption, the claim of *ultra vires* must fall. The Court declares that the acts of the directors and officers in proceeding to mutualize was a proper exercise of power within the law and was not *ultra vires*.

The fifth, sixth and seventh causes of action are directed against the right of the mutualization trustees to vote the shares of stock. Basically the three causes of action are directed against the constitutionality of section 199 aforesaid. This Court has already dealt with the alleged violations of Article I, section 10, of the Federal Constitution and the Fourteenth Amendment thereto and with the alleged violations of Article I, section 6, of the State Constitution and has held that there is and was no constitutional violation. The untenableness of the plaintiffs' position can be noted by carrying out their argument to its logical conclusion. If the stock is company property immediately upon surrender, and before mutualization, the anomalous situation would result that the dissenting

stockholders would control the company. Subdivision 3 was and is a reasonable attempt to avoid the anomaly and to provide for the internal management of the corporation. As such it is a proper exercise of the constitutionally reserved power. The stock does not become treasury stock until the plan is completed. The assignment to the trustees is perfectly proper and legal. Of course, their voting the stock and carrying out of the plan of mutualization is valid exercise of the power conferred under section 199 and the four-times approved plan of mutualization.

There are many other specific declarations requested but they are all dependent upon the determination of the constitutionality of section 199 aforesaid. Having found and declared the section valid and constitutional, it follows and this Court declares that the acts done by the officers, directors and mutualization trustees in carrying out a plan, found to meet the requirements of the law by the Superintendent of Insurance, are proper and valid and no injunction against acts done thereunder should issue out of this Court. It should be noted here that the parties to this action have stressed the fact that the only issue submitted herein is the constitutionality of section 199 of the Insurance Law as it applies to and affects the mutualization of the Farmers and Traders Insurance Company. Having found as indicated, the declarations as to specific items becomes unnecessary other than to deny them.

This memorandum is in detail and is filled in lieu of findings under section 440 of the Civil Practice Act. Prepare decree accordingly.

Dated: April 15th, 1959.

WILLIAM E. McCLUSKY
Justice Supreme Court

Judgment of New York Supreme Court.

[Same Title.]

The issues in the above entitled action having duly come on to be heard before Hon. William E. McClusky, one of the Justices of this Court, without a jury, at a regular Trial and Special Term of this Court held at the Onondaga County Court House, Syracuse, N. Y. on Dec. 30, 1958, and plaintiffs herein having all appeared by their attorneys, Smith and Sovik, (Laurence Sovik and Harlow B. Ansell of counsel), and defendants Louis J. Taber, Edwin W. Henne, H. B. Doust, Harry A. Caton, Lester D. Hays, Alvin E. Hanson, George M. Lewis, Walter L. Weeden, D. Eaton Alvord, Beatty H. Dimit, Harry A. Dunsmoor, Fred J. Freestone, Clarence E. Johncox, James B. Kirby, B. Burdette Lee, Grant T. Little, Henry D. Sherwood, Benjamin E. Shove, Clarence H. Twichell and Farmers and Traders Life Insurance Co. (hereinafter called "the appearing defendants") having all appeared by their attorneys, Hancock, Dorr, Ryan and Shove, (Benjamin E. Shove and Philip T. Seymour of counsel), and it having been stipulated in writing by said attorneys for plaintiffs and said attorneys for the appearing defendants that only the appearing defendants have been made parties defendant to this action, and Louis J. Lefkowitz, Attorney General of the State of New York, having been permitted by an order of this Court made on December 29, 1958, to appear in this action as a party defendant pursuant to and for the purposes set forth in Sec. 71 of the Executive Law of New York and having appeared herein (by Samuel Hirshowitz; George K. Bernstein and Philip Weinberg, of counsel), and the issues in this action having been duly tried and the Court having heard the allegations and proofs of the respective parties, and the Court, after due deliberation, having duly made and filed its decision dated April 15, 1959, stating the facts found and the conclusions of law thereon, and directing judgment as hereinafter provided, it is

Judgment of New York Supreme Court

ADJUDGED AND DECREED,

(a) That conversion of defendant Farmers and Traders Life Insurance Company into a mutual life insurance corporation and acquisition by it of shares of its outstanding capital stock, all pursuant to Section 199 of the Insurance Law is, and at all times since on and immediately prior to October 8, 1953, has been, an object lawful in and of itself for said company;

(b) That conversion of Farmers and Traders Life Insurance Co. into a mutual life insurance corporation and acquisition by it of shares of its outstanding capital stock to that end is now, and at all times since its incorporation in 1912 has been, an object lawful in and of itself for said Company;

(c) That Farmers and Traders Life Insurance Co. now has, and at all times since on and immediately prior to Oct. 8, 1953, has had, the right and power, under and consistent with its Charter, to convert into a mutual life insurance corporation and, to that end, to acquire shares of its outstanding capital stock, all pursuant to Sec. 199 of the Insurance Law of New York, by complying with the terms of said Sec. 199;

(d) That Farmers and Traders Life Insurance Co. now has, and at all times since its incorporation in 1912 has had, the right and power, under and consistent with its Charter, to convert into a mutual life insurance corporation and, to that end, to acquire shares of its outstanding capital stock;

(e) That the officers and directors of Farmers and Traders Life Insurance Co. now have, and at all times since on and immediately prior to Oct. 8, 1953, had had, the right and power, as such officers and directors, to propose to the stockholders and policyholders of Farmers and Traders Life Insurance Co. and to the Superintendent of

Insurance of New York State that Farmers and Traders Life Insurance Co. become a mutual life insurance corporation and acquire shares of its outstanding capital stock to that end, all pursuant to the provisions of Sec. 199 of the Insurance Law;

(f) That the officers and directors of Farmers and Traders Life Insurance Co. now have, and at all times since on and immediately prior to Oct. 8, 1953, have had, the right and power, as such officers and directors, to promulgate a plan for the mutualization of Farmers and Traders Life Insurance Co. pursuant to Sec. 199 of the Insurance Law;

(g) That said plan of mutualization, (Exh. S-8), is now, and at all times since May 15, 1954, has been, lawful upon its face;

(h) That Farmers and Traders Life Insurance Co. now has, and at all times since on and immediately prior to May 15, 1954, has had, the right and power, under and consistent with its Charter, to formulate and carry out said plan of mutualization, (Exh. S-8);

(i) That the officers and directors of Farmers and Traders Life Insurance Co. acted properly and within their rights and powers as such officers and directors in formulating, promulgating and carrying out said plan of mutualization, (Exh. S-8);

(j) That said plan of mutualization, (Exh. S-8), has been validly and effectively adopted by the directors of Farmers and Traders Life Insurance Co. and approved by its stockholders and policyholders and by the Superintendent of Insurance of New York State, all in full compliance with the requirements of Sec. 199 of the Insurance Law;

(k) That said plan of mutualization, (Exh. S-8) is, in all respects, valid and effective in accordance with its terms and with the terms of Sec. 199 of the Insurance Law;

(l) That said plan of mutualization, (Exh. S-8) and the formulation, promulgation and carrying out of that plan of mutualization was, at all relevant times and is now, within the corporate powers granted to Farmers and Traders Life Insurance Co. by the State of New York under and consistent with its corporate Charter;

(m) That said plan of mutualization, (Exh. S-8) and the formulation, promulgation and carrying out of that plan of mutualization is now, and was at all times since on and immediately prior to May 15, 1954, consistent with the purposes for which Farmers and Traders Life Insurance Co. was incorporated and with the purposes for which said Company has existed and with the purposes for which said Company is existing;

(n) That, under the provisions of Sec. 199 of the Insurance Law and of said plan, (Exh. S-8), no stockholder of Farmers and Traders Life Insurance Co. is, or was at any time, compelled to sell his shares of the capital stock of Farmers and Traders Life Insurance Co. to said Company;

(o) That, under the provisions of Sec. 199 of the Insurance Law and of said plan, (Exh. S-8), each stockholders of Farmers and Traders Life Insurance Co. has, and at all times since the approval of that plan by the Superintendent of Insurance of New York has had, the free and uncontrolled election, entirely in the discretion of the owner of the stock, to retain his shares of the capital stock of Farmers and Traders Life Insurance Co. or to surrender them to Farmers and Traders Life Insurance Co. in accordance with the terms of said plan

(Exh. S-8), in return for the mutualization price specified therein, to be paid in accordance with the terms of said plan (Exh. S-8);

(p) That neither said plan (Exh. S-8) nor the formulation, promulgation nor carrying out of that plan now violates, or at any time has violated, any of the following constitutional provisions:

(i) The obligation-of-contracts clause of Art. I, Sec. 10, of the United States Constitution;

(ii) The due-process clause of the 14th Amendment to the United States Constitution;

(iii) The equal-protection-of-the-laws clause of the 14th Amendment to the United States Constitution;

(iv) The due-process clause of Art. 1, Sec. 6, of the New York State Constitution;

(q) That none of the provisions of Sec. 199 of the Insurance Law as applied to the mutualization of Farmers and Traders Life Insurance Co. pursuant to said plan (Exh. S-8), and insofar as such provisions authorized said plan and the mutualization of Farmers and Traders Life Insurance Co. pursuant to said plan, is now, or at any time has been, in violation of any of the following constitutional provisions:

(i) The obligation-of-contracts clause of Art. I, Sec. 10, of the United States Constitution;

(ii) The due-process clause of the 14th Amendment to the United States Constitution;

(iii) The equal-protection-of-the-laws clause of the 14th Amendment to the United States Constitution;

(iv) The due-process clause of Art. I, Sec. 6, of the New York State Constitution;

(r) That Farmers and Traders Life Insurance Co. now has, and at all times since its incorporation in 1912 has had, the power, under and consistent with its Charter, to issue participating life insurance policies;

(s) That Farmers and Traders Life Insurance Co. had, on Jan. 1, 1955, and at all times since its incorporation in 1912 had had the right and power, under and consistent with its Charter, to at any time discontinue for the future issuing non-participating life insurance policies and commence issuing only participating life insurance policies;

(t) That the issuance by Farmers and Traders Life Insurance Co. of participating life insurance policies and deferred annuity and pure endowment contracts beginning on Jan. 1, 1955, and continuing thereafter, and the discontinuance by Farmers and Traders Life Insurance Co. of writing any new non-participating policies and contracts on and after Jan. 1, 1955, were and are within the powers granted to Farmers and Traders Life Insurance Co. by the State of New York;

(u) That Farmers and Traders Life Insurance Co. now has, and at all times since the approval by the Superintendent of Insurance of said plan (Exh. S-8), has had, the right and power to acquire shares of its outstanding capital stock by purchase from its stockholders in accordance with and for the purpose of said plan, (Exh. S-8), and to pay the purchase price for those shares of its capital stock specified in said plan (Exh. S-8) out of the "accumulated net earnings" of the "non-participating business" only of said Company, as the terms "accumulated net earnings" and "non-participating business" are defined in said pl. n (Exh. S-8), all in accordance with said plan (Exh. S-8);

(v) That Farmers and Traders Life Insurance Co. now has, and at all times since the approval of said plan of mutualization, (Exh. S-8), by the Superintendent of Insurance has had, the right and power to assign and transfer shares of its outstanding capital stock so acquired by purchase pursuant to said plan (Exh. S-8), to trustees appointed and acting under said plan (Exh. S-8) and the provisions of Sec. 199 of the Insurance Law, on the books of Farmers and Traders Life Insurance Co.;

(w) That the acquisition by Farmers and Traders Life Insurance Co. by purchase of shares of its capital stock pursuant to said plan, (Exh. S-8), and the assignment and transfer of those shares on the books of said Company to the trustees under said plan (Exh. S-8) pursuant to the terms of said plan was and is, in all respects, valid and effective, subject to the terms of Sec. 199 of the Insurance Law;

(x) That the trustees under said mutualization plan (Exh. S-8) had, on March 20, 1956, and have had at all times since then, and now have, the power to vote any and all shares acquired by defendant Farmers and Traders Life Insurance Co. pursuant to said mutualization plan (Exh. S-8) and assigned and transferred on the books of said Company to them, at all corporate meetings at which stockholders of said Company had the right to vote, until all of the outstanding capital stock of defendant Farmers and Traders Life Insurance Company shall have been acquired;

(y) That the trustees under said mutualization plan (Exh. S-8) are entitled to receive dividends upon the shares of stock acquired by Farmers and Traders Life Insurance Co. pursuant to said plan (Exh. S-8) and transferred and assigned on the books of said Company to them, pro rata with the dividends paid by Farmers and

Farmers Life Insurance Co. on the shares of stock of said Company held by other stockholders of said Company;

(z) That all dividends and other sums received by the trustees under the plan (Exh. S-8) on the shares of stock of Farmers and Traders Life Insurance Co. acquired by said Company pursuant to said plan and transferred and assigned on the books of said Company to said trustees, shall, after paying the necessary expenses of executing the trust, continue to be immediately repaid to Farmers and Traders Life Insurance Co. for the benefit of all who are or may become policyholders of said Company and entitled to participate in the profits thereof, and shall continue to be added to and shall become part of the surplus earned by said Company and shall be apportionable accordingly as a part of such surplus among such policyholders; and it is further

ORDERED, ADJUDGED AND DECREED, that Plaintiffs 1st, 2nd, 3rd, 4th, 5th, 6th and 7th causes of action be and the same hereby are dismissed on the merits and it is further

ORDERED, ADJUDGED AND DECREED, that all of the demands for relief, of Plaintiffs, prayed for in their amended complaint be and the same hereby are denied.

Dated: Syracuse, New York, May 7th, 1959.

Enter,

WILLIAM E. McCLUSKY
J. S. C.

Judgment of Appellate Division.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—FOURTH DEPARTMENT.

EARL C. SYLVANDER, *et al.*,
Plaintiffs-Appellants,

against

LOUIS J. TABER, *et al.*,
Defendants-Respondents,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Intervening Defendant-Respondent.

The above named Earl C. Sylvander, Margaret C. Sylvander, Fred L. Eames, S. H. Terry and John O. Young, individually and on behalf of all other stockholders similarly situated, plaintiffs in this action, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from a judgment of the Supreme Court, entered in the office of the Clerk of the County of Onondaga, on the 7th day of May, 1959, and the said appeal having been argued by Mr. Laurence Sovik, of counsel for the appellants, and by Mr. Benjamin E. Shove, of counsel for the appearing respondents, defendants, and by Mr. Samuel A. Hirshowitz, of counsel for the respondent, Attorney General, and an order of said Appellate Division having been made and entered, affirming said judgment with costs of said appeal to the respondents, all the Justices concurring.

Judgment of Appellate Division

Now on motion of Hancock, Dorr, Ryan and Shove, attorneys for the appearing respondents-defendants,

It is hereby ADJUDGED that said judgment be, and the same hereby is, affirmed in all things and that the respondents herein recover of the appellants herein the sum of $474.63, costs of said appeal and that they have execution therefor.

Dated: January 6, 1960.

/s/ NORBERT F. HORNUNG,
Clerk.

Judgment of New York Court of Appeals.

COURT OF APPEALS,

STATE OF NEW YORK.

EARL C. SYLVANDER, *et al.*,
Plaintiffs-Appellants,

against

LOUIS J. TABER, *et al.*,
Defendants-Respondents,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Intervening Defendant-Respondent.

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 19th day of May in the year of our Lord one thousand nine hundred and sixty, before the Judges of said Court.

Witness,

The Hon. Charles S. Desmond, Chief Judge, Presiding.
Raymond J. Cannor, Clerk.

Be it Remembered, That on the 23rd day of March in the year of our Lord one thousand nine hundred and sixty, Earl C. Sylvander, & ors., individually and on behalf of all other stockholders similarly situated, the appellants in this cause, came here unto the Court of Appeals, by Smith & Sovik, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the

judgment of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And Louis J. Taber, & ors., &c., the respondents, and Louis J. Lefkowitz, Attorney General of the State of New York, the intervenor-respondent—in said cause, afterwards appeared in said Court of Appeals by Hancock, Dorr, Ryan & Shove, attorneys and Louis Lefkowitz, Attorney General, in person.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Laurence Sovik, of counsel for the appellants, and by Mr. Benjamin E. Shove, of counsel for the appearing respondents, and by Mr. Samuel A. Hirshowitz, of counsel for the intervenor-respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which rec-

ord now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the State of New York.

Amended Remittitur.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the sixth day of October A. D. 1960.

ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following, viz:

"Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Appellants contended that their contract obligations were impaired in violation of Art. I, §10, of the Constitution of the United States; and that their rights to due process of law under the Fourteenth Amendment of the Constitution of the United States were denied. The Court of Appeals held that there were no such violations and that there was no merit or substance to appellants' contentions."

APPENDIX B.

Constitution of the United States.

ARTICLE 1

Section 10 No State shall * * * pass any * * * Law impairing the Obligations of Contracts * * *.

AMENDMENT XIV

Section 1 * * * nor shall any State deprive any person of life, liberty, or property without due process of law; * * *.

New York Insurance Law, Section 199.

(Laws of 1939, Chap. 882)

* * * * * * *

2. Any domestic stock life insurance company heretofore or hereafter incorporated under any law of this state may become a mutual life insurance company, and to that end may formulate and carry out a plan for the acquisition by it of its outstanding capital stock, as follows:

(a) Such plan shall have been adopted by a vote of a majority of the directors of such company;

(b) Such plan shall have been approved by a vote of stockholders representing a majority of the outstanding capital stock at a meeting of stockholders called for that purpose;

(c) Such plan shall have been approved by the vote of a majority of the policyholders who are eligible to vote and who vote at a meeting called for that purpose.

New York Insurance Law, Section 199

Any policyholder who holds life insurance in such company in an amount at least equal to one thousand dollars and whose insurance is then in force and has been in force for at least one year prior to such stockholders' meeting, shall be eligible to vote thereat, either in person or by proxy or by mail. Notice of such meeting shall be given by mailing such notice from the home office of such company at least thirty days prior to such meeting in a sealed envelope, postage prepaid, addressed to each policyholder at his last known postoffice address. Such meeting shall be conducted in such manner as may be provided for in such plan, with the approval of the superintendent. The superintendent shall supervise and direct the methods and procedure of said meeting and shall appoint an adequate number of inspectors to conduct the voting at said meeting, who shall have power to determine all questions concerning the verification of the ballots, the ascertaining of the validity thereof, the qualifications of the voters and the canvass of the vote. Such inspectors, or any one thereof designated by the superintendent, shall certify to the superintendent and to such company the result of such vote, and with respect thereto shall act under such rules as shall be prescribed by the superintendent. All necessary expenses incurred by the superintendent or incurred with his approval by the inspectors appointed by him shall be paid by such company upon the certificate of the superintendent;

(d) Such plan shall have been submitted to the superintendent and shall have been approved by him as conforming to the requirements of this chapter and as not prejudicial to the policyholders of such company or to the insuring public;

(e) Such plan may specify the purchase price to be paid by such company for shares of its capital stock, and in such case the price so specified shall be adhered to.

New York Insurance Law, Section 159

If such plan does not specify the price to be paid for such shares, such company shall first obtain the approval of the superintendent for every payment made for the acquisition of any shares of its capital stock.

(f) Before approving any such plan or any such payment, the superintendent shall be satisfied, by such investigation as he may make or by such evidence as he may require, that such company, after deducting the aggregate sum appropriated by such plan for the acquisition of any part or all of its capital stock, and in the case of any payment not fixed by such plan and subject to approval as aforesaid, after deducting also the amount of such payment, will be possessed of admitted assets in an amount equal to the sum of (a), (b) and (c), as follows:

(a) Its entire liabilities, including the net values of its outstanding contracts computed in accordance with the provisions of this chapter, and (b) the minimum surplus prescribed by this chapter for mutual life insurance companies hereafter organized to do the same kind or kinds of business, and (c) an additional contingent surplus deemed by the superintendent necessary to protect its policyholders and the insuring public, in view of the past experience of such company, the character of its assets, its present management, and its probable future earnings. The action of the superintendent in refusing to give any approval required by this subsection shall be subject to judicial review.

No change shall be made in any such plan, adopted and approved as aforesaid, except upon the formulation, adoption and approval of a new plan in accordance with the foregoing requirements.

3. In pursuance of any such plan to convert a domestic stock life insurance company into mutual life insurance company, such company shall have power, and shall be privileged, to acquire any shares of its capital stock by

gift, bequest, or purchase. Until all of the shares of its outstanding capital stock are acquired, any shares so acquired shall be taken and held in trust for all the policyholders of such company, as hereinafter provided, and shall be assigned and transferred on the books of the company to three trustees, who shall be named in such plan and shall be approved by the superintendent. All shares held by such trustees shall be deemed admitted assets of such company at their par value. Such trustees shall have power to vote any shares so acquired at all corporate meetings at which stockholders have the right to vote, until all of the outstanding capital stock of such corporation shall have been acquired, at which time, the entire capital stock of such corporation shall be retired and cancelled, and *thereupon* such company shall be and become a mutual life insurance company without capital stock. The plan of conversion formulated pursuant to subsection two shall provide for the method of filling vacancies occurring among such trustees. Before undertaking any of the duties of his appointment each trustee shall file with the company a verified acceptance of his appointment and a declaration that he will faithfully discharge his duties as such trustee. All dividends and other sums received by such trustees on the shares of stock so acquired by them, shall, after paying the necessary expenses of executing the trust, be immediately repaid to such company for the benefit of all who are or may become policyholders of such company and entitled to participate in the profits thereof, and shall be added to and become a part of the surplus earned by such company and shall be apportionable accordingly as a part of such surplus among such policyholders. The provisions of section twenty-five of the general corporation law and of section eleven of the personal property law shall not apply to the trust hereinbefore authorized.

FILE COPY

FILED
DEC 8 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960.

No. 529

EARL C. SYLVANDER, MARGARET C. SYLVANDER, FRED L. EAMES, S. H. BERRY and JOHN O. YOUNG, individually and on behalf of all other stockholders similarly situated,

Appellants,

FARMERS AND TRADERS LIFE INSURANCE COMPANY, LOUIS J. TABER, EDWIN W. HENNE, H. B. DOUST, HARRY A. CATON, ALVIN E. HANSON, GEORGE M. LEWIS, WALTER L. WEEDEN, D. EATON ALVORD, KENZIE S. BAGSHAW, BEATTY H. DIMIT, HARRY A. DUNSMOOR, FRED J. FREESTONE, CLARENCE E. JOHNCOX, JAMES B. KIRBY, B. BURDETTE LEE, GRANT T. LITTLE, HENRY D. SHERWOOD, BENJAMIN E. SHOVE, CLARENCE H. TWICHELL and HELEN E. HAYES, as Administratrix of Estate of LESTER D. HAYES,

Appellees,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS APPEAL.

THE REPORTER COMPANY, INC., Walton, N. Y.—1960

Index.

	Page
Statement	2
Facts	4
Answering Statements on Pages 10 to Top of Page 12 of Appellants' Jurisdictional Statement	8
Legislative History of Section 199 of Insurance Law	11
The Questions Which Appellants in Their Notice of Appeal and Jurisdictional Statement State Are Presented by This Appeal Do Not Present a Substantial Federal Question	14
Question 1	15
Question 2	17
Question 3	19

CITATIONS.

Looker v. Maynard, 179 U. S. 46, 21 Sup. Ct. 21	23
Lord v. Equitable Life Assurance Society, 194 N. Y. 212	24
Matter of Morse (Bank of America), 247 N. Y. 290, at page 298	20
Miller v. State of New York, 82 U. S. 478, 15 Wall. 478, 21 L. Ed. 98	23
Sherman v. Smith, 1 Black 587, 17 L. Ed. 163	22
Sylvander, *et al.*, v. Taber, *et al.*, 6 A. D. 2d 987	2

STATUTES.

Page

Insurance Law of State of New York:

Section 199 ..... 2, 11, 15, 16, 18, 19

Section 70 ..... 4, 5, 6

Section 95 ..... 12, 13, 15, 17

Constitution of the United States, Article I, Section 10 ..... 2, 22

Laws of 1906, Section 31 of Chapter 326 ..... 12; 18, 24

New York State Constitution (N. Y. Const. 1846, Art. 8, Sec. 1; New York Const. of 1894, Art. 8, Sec. 1) 22

Revised Statutes passed in 1827 (1 R. S. 600, Sec. 8) .. 22

General Corporation Law, Section 5 22

No.

October Term, 1960.

IN THE

Supreme Court of the United States

EARL C. SYLVANDER, MARGARET C. SYLVANDER, FRED L. EAMES, S. H. TERRY and JOHN O. YOUNG, individually and on behalf of all other stockholders similarly situated,

Appellants,

v.

FARMERS AND TRADERS LIFE INSURANCE COMPANY, LOUIS J. TABER, EDWIN W. HENNE, H. B. DOUST, HARRY A. CATON, ALVIN E. HANSON, GEORGE M. LEWIS, WALTER L. WEEDEN, D. EATON ALVORD, KENZIE S. BAGSHAW, BEATTY H. DIMIT, HARRY A. DUNSMOOR, FRED J. FREESTONE, CLARENCE E. JOHNCOX, JAMES B. KIRBY, B. BURDETTE LEE, GRANT T. LITTLE, HENRY D. SHERWOOD, BENJAMIN E. SHOVE, CLARENCE H. TWICHELL and HELEN E. HAYES, as Administratrix of Estate of Lester D. Hayes,

Appellees,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS APPEAL

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss the appeal taken herein from the final judgment of the Court of Appeals of the State of New York entered on May 19, 1960, on the ground that it does not present a substantial federal question and on the further ground that such judgment rests on an adequate non-federal basis.

Statement

This is a declaratory judgment. Under the New York practice it was necessary to have a trial on the merits and for the Court to declare the rights of the parties. See *Sylvander, et al., v. Taber, et al.*, 6 A. D. 2d 987.

After such decision the appellants herein served an amended complaint (which we, following the appellants' example, shall hereinafter call the "complaint"). There were seven alleged causes of action therein. In six of them, the first, second, third, fifth, sixth and seventh, the appellants alleged that Section 199 of the Insurance Law of the State of New York and the plan of mutualization adopted by Farmers and Traders Life Insurance Company pursuant thereto violated their rights under Article I, Section 10, of the Constitution of the United States and the taking of property without due process of law clause of the Fourteenth Amendment (see Appendix B to appellants' jurisdictional statement, page 31a*). In the fourth they alleged that the acts of appellees under the plan were *ultra vires*. Upon the amended answer to such complaint the case went to trial on December 30, 1958, before Honorable William E. McClusky, a Justice of the Supreme Court of the State of New York, without a jury. Practically all

* Page references are to pages of appellants' jurisdictional statement and the appendices thereto.

of the evidence consisted of stipulated facts and documentary evidence offered by the appellants. Mr. Justice McClusky, on April 15, 1959, rendered an opinion in favor of the appellees, 19 Misc. 2d 1005 (pp. 1a to 17a). Pursuant thereto a declaratory judgment declaring the rights of the parties as prayed for by the appellees and dismissing on the merits each of the seven alleged causes of action was entered on May 7, 1959 (pp. 18a to 25a).

On appeal by the appellants to the Appellate Division of the Supreme Court, Fourth Department, said judgment was unanimously affirmed without opinion, 9 A. D. 2d 1019 (pp. 26a to 27a). On appeal by the appellants to the Court of Appeals said judgment was unanimously affirmed without opinion, 8 N. Y. 2d 835 (pp. 28a to 30a).

On motion by the appellants to amend the remittitur to recite that federal questions were presented and necessarily passed upon, the Court of Appeals made on October 6, 1960 the following order:

> "ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following, viz:
>
> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Appellants contended that their contract obligations were impaired in violation of Art. I, §10, of the Constitution of the United States; and that their rights to due process of law under the Fourteenth Amendment of the Constitution of the United States were denied. The Court of Appeals held that there were no such violations and that there was no merit or substance to appellants' contentions" (p. 30a).

This case involved a consideration of many provisions of the present Insurance Law and the prior Insurance Law of the State of New York and the interpretation and construction thereof. The interpretation and construction

placed upon these statutes by the courts of the State of New York were such that, if any federal question remained, it was certainly not a substantial one as defined in subdivision (c) of Rule 15 of the Revised Rules of this Court.

Facts

The defendant corporation Farmers and Traders Life Insurance Company (hereinafter sometimes referred to as "Farmers and Traders" or "the Company") was incorporated under the laws of the State of New York and received its charter on July 12, 1912. The individual defendants who have been served or appeared herein are either (a) officers and directors of the Company, or (b) just directors, or (c) just officers.

At the time it was incorporated there were in existence, as shall be more fully pointed out hereafter, the statutes pursuant to which the plan of mutualization herein was adopted, and also pursuant to which everything that was done pursuant thereto was done, except for a single matter that will be pointed out hereafter. This sole exception, the so-called 1917 amendment, was merely an amendment to the statutes in existence in 1912 and was adopted by the Legislature pursuant to its reserved power to amend or alter charters in order to carry out the objectives and purposes of the statutes in existence at the time the charter was issued, which statutes now appear as Section 199 of the present Insurance Law.

Farmers and Traders was incorporated pursuant to Section 70 of the then Insurance Law (Sections 45 and 48 of the present Insurance Law). Similar provisions go back to Chapter 463 of the Laws of 1853.

In strict compliance with such Section 70, Article III of its certificate of incorporation provided:

"ARTICLE III.

"The kind of insurance to be undertaken is insurance upon the lives or health of persons, and every insurance appertaining thereto, and to grant, purchase or dispose of annuities, which kind of insurance is authorized under Subdivision 1 of Section 70 of the Insurance Law of the State of New York, being Chapter 33 of the Laws of 1909 known as Chapter 28 of the Consolidated Laws and the acts amendatory thereof and supplemental thereto" (II 203).*

The statement on page 6 of appellants' jurisdictional statement that the Company was incorporated "to engage in the business of writing non-participating life insurance policies" is incorrect. It was incorporated to write any and every kind of life insurance. Whether it would be by non-participating policies or participating policies was expressly left to the decision of the Board of Directors. Article IV of its certificate of incorporation, in strict compliance with Section 70, provides:

"ARTICLE IV.

"The mode and manner in which its corporate powers are to be exercised are as follows: The corporate powers of said company shall be exercised by a Board of Directors consisting of twenty-five persons, and by such officers and advisory boards as the said Board of Directors may, from time to time, empower and appoint" (II 204-205).

The Board of Directors elected to make and undertake insurance upon the lives of persons by issuing non-participating policies.

The judgment appealed from has declared:

"(r) That Farmers and Traders Life Insurance Co. now has, and at all times since its incorporation

* Reference is to folio number in Volume II of the record on appeal. Folio numbers in Volume I will be prefixed by the Roman numeral I.

in 1912 has had, the power, under and consistent with its Charter, to issue participating life insurance policies:

"(s) That Farmers and Traders Life Insurance Co. had, on Jan. 1, 1955, and at all times since its incorporation in 1912 had had the right and power under and consistent with its Charter, to at any time discontinue for the future issuing non-participating life insurance policies and commence issuing only participating life insurance policies;

"(t) That the issuance by Farmers and Traders Life Insurance Co of participating life insurance policies and deferred annuity and pure endowment contracts beginning on Jan. 1, 1955, and continuing thereafter, and the discontinuance by Farmers and Traders Life Insurance Co. of writing any new non-participating policies and contracts on and after Jan. 1, 1955, were and are within the powers granted to Farmers and Traders Life Insurance Co. by the State of New York;" (p. 23a).

We have considered these provisions of the certificate of incorporation and Section 70 of the former Insurance Law because of the provisions in the plan of mutualization that on January 1, 1955, Farmers and Traders should cease writing non-participating policies and thereafter write only participating policies. [3]See subdivision (g) of Article II of the plan of mutualization at page 128 of Volume II of record on appeal. Appellants in the State courts attacked such provision as *ultra vires* and unconstitutional. They are not complaining of or attacking such provisions in this Court. Their jurisdictional statement does, nevertheless, contain many erroneous and misleading statements of the effects of such plan of mutualization on their rights as stockholders of Farmers and Traders and of the effects which will result, according to appellants, from the fact that the Company ceased writing non-participating policies on January 1, 1955 and has been writing ever since only participating policies. We shall presently correct such statements.

The original capital of Farmers and Traders was $200,000, consisting of 2,000 shares of common stock of the par value of $100 each. In 1919 the capital was increased by $100,000, consisting of 1,000 shares of the par value of $100 each.

The plan of mutualization involved herein was adopted in strict accordance with the mutualization statutes, and particularly subsections 2 and 3 of Section 199. The Board of Directors duly approved the plan on May 15, 1954. The stockholders duly approved on July 19, 1954 by a vote of 2,467 shares out of a total of 3,000 shares outstanding in favor and 172 shares against. The policyholders duly approved on August 31, 1954. The Superintendent of Insurance on November 15, 1954.

We now relate the evidence as to when the named appellants acquired their Farmers and Traders stock. Saydee H. Terry is the record holder of 2 shares as of November 22, 1944. There is no evidence that Fred L. Eames is the owner of any shares. John O. Young is the holder of record of 74 shares as follows: 2 shares on January 19, 1934, 2 shares on November 26, 1937, 24 shares on November 28, 1949, 46 shares on April 15, 1953. When he acquired the last two blocks the market value of the stock was $210 to $220 per share. When he acquired the last block he knew of the intention to mutualize the Company. The plaintiff Margaret C. Sylvander is the record owner of 2 shares acquired on June 10, 1953. The plaintiff Earl C. Sylvander is the record owner of 79 shares, the first 11 shares being acquired on June 10, 1953, and the balance in blocks of different sizes on thirteen different occasions from October 1, 1953 to August 2, 1957. (This action was commenced on March 20, 1956.) On September 16, 1953, he learned about the plan to mutualize the Company. For the 29 shares acquired after February 1, 1954, he paid more than $1,000 per share.

Answering Statements on Pages 10 to Top of Page 12 of Appellants' Jurisdictional Statement

At top of page 10 of appellants' jurisdictional statement they state the plan deprives them of their "vested rights." This begs the very questions which appellants seek to present to this Court.

The quotation (p. 10) from the "prospectus" is quite out of order because the document quoted from is not in evidence (bottom p. 6a).

We have already shown that under statutes in existence when the Company was organized it had the right to switch at any time from issuing non-participating to participating policies. Such switch would be one step in the conversion of Farmers and Traders from a stock company issuing non-participating policies to a mutual company issuing participating policies.

We shall hereafter show that under the statutes in existence when the Company was organized it had the right to adopt a plan for the acquisition of its own stock as a further step in its conversion to a mutual company.

Every stockholder of Farmers and Traders acquired his stock subject to the right of the Company to switch at any time from non-participating policies to participating policies and subject to the right of the Company to adopt a plan to purchase its own stock. No stockholder had a "vested right" not to have the Company make the switch and not to have the Company adopt a plan to purchase its own stock.

Furthermore, as shall be more fully pointed out hereafter, every stockholder of Farmers and Traders has the right, under the plan of mutualization and under Section 199 and the predecessors thereof back to 1911, to elect, entirely in his own discretion, to retain his shares of

stock or to surrender them to the Company in accordance with the terms of the plan. See subdivisions (n) and (o) of judgment (p. 21a).

Appellants have elected to retain their shares. What are their rights as such stockholders?

The opinion of the learned Trial Justice states:

> "What is the property, if any, of which the plaintiffs have been deprived? Their shares entitled them to dividends, the right to vote at annual and special elections, and to an aliquot distribution of the net assets of the corporation upon dissolution. Section 199 aforesaid does not deprive them of any of those rights" (p. 30a).

After the policyholders had approved the plan, the Superintendent of Insurance granted the appellants' request for a hearing. Honorable Raymond Harris, Deputy Superintendent and Counsel of the Superintendent of Insurance, was authorized to conduct the hearing. He thereafter rendered his report to the Superintendent of Insurance, who approved the same. The appellants put in evidence the stenographic transcript of the hearings and a copy of Mr. Harris's report (Ex. S-10). On page 9 of the report appears the following:

> "• • • He (Mr. Sovik) also urged that since, upon adoption of the plan, the company would discontinue the issuance of non-participating insurance contracts and would issue only participating contracts, non-assenting stockholders would no longer be entitled to earnings of the company from new business.
>
> "Obviously, the concept that mutualization in any wise affects the equity of stockholders who do not surrender their stock under the plan is entirely incorrect and based upon a misconstruction of Section 199. That section does not require any stockholder to surrender his stock and the latter's rights as a stockholder remain unaltered while he

retains his stock. Since the rights of the stockholder who retains his stock after adoption of the plan remains unchanged, there is no legal basis for the contention that such stockholders are not entitled to share in the earnings from the new participating business written subsequent to the adoption of the plan."

The earnings of the Company prior to January 1, 1955, were good. They have been good since then. The accumulated net earnings as of December 31, 1953, were $2,019,121.80 (see definition of "Accumulated Net Earnings" in the plan and also line 30 of Liabilities on Ex. S-16). The Company's net gain for 1954 was $338,420.31 (line 28, Ex. S-16). The net gains or earnings from the non-participating business for the years 1955, 1956 and 1957 total $2,155,873.60. It is thus apparent that by December 31, 1957, the Company's earnings from the non-participating business were sufficient to pay the full mutualization price of $1,000 per share on all its 3,000 shares whenever all the stockholders elected to turn in their stock. Earnings from the non-participating business will continue at high levels for many years. It is true that there have been losses from the participating business. That was to be expected. These losses are decreasing each year. We wrote in our brief in the Court of Appeals that based on the evidence the participating business will be operating at a profit within ten years after January 1, 1955 and the losses in the early years will be completely wiped out. Up to December 31, 1957 stockholders owning 2,784 shares had voluntarily elected to surrender their stock to the Company and the Company, pursuant to the mutualization plan, had paid them $500 per share, for a total of $1,392,000. In spite of these payments and the initial losses in the participating business, the Company's surplus increased from $2,019,121.80 on December 31, 1953 to $2,273,485.18 on December 31, 1957. Payments on the mutualization price of $1,000 per

share are proceeding faster than anticipated in the plan. Once the full $1,000 per share has been paid to those who voluntarily turn in their stock and the corresponding surplus for the shares not turned in has been set aside (Article III of plan), the remaining earnings from the non-participating business will be available for dividend payments to all the 3,000 shares outstanding. If appellants believe that the directors are not paying dividends at a suitable rate, they can start an action to compel declaration of higher dividends. In the original complaint herein there was a cause of action to compel a declaration of a dividend of $400 per share. By stipulation that cause of action was omitted from the amended complaint without prejudice (I 411-414).

What is the value of plaintiffs' stock under the foregoing facts? That is purely a matter of opinion. It is known that in 1954, 1955, 1956 and 1957 plaintiff Earl C. Sylvander paid more than $1,000 per share.

The facts just stated are really irrelevant to the determination of whatever constitutional question there may be in this case. We have related them to correct misstatements in appellants' jurisdictional statement.

It must always be remembered that plaintiffs took their stock subject to the constitutional right of the Company to switch at any time from writing non-participating policies to writing participating policies and the constitutional right of the Company to adopt at any time a plan to purchase its own stock and, therefore, subject to whatever effect, good or bad, the exercise of such rights might have on their stock.

Legislative History of Section 199 of Insurance Law

Section 199 of the Insurance Law is derived from part of the legislation adopted in 1906 as a result of the report of the Armstrong Committee which, with Honor-

able Charles Evans Hughes as Counsel, had made an intensive investigation of life insurance companies in New York and rendered its report to the Legislature (Assembly Doc. No. 41, 1906). Among other statutes it proposed were ones designed to permit a stock life insurance company to convert itself into a mutual life insurance company. We have already indicated that under Section 70 a stock life insurance company could at any time by action of its Board of Directors change from writing non-participating policies to writing participating policies. The Committee therefore proposed legislation to permit a stock company to acquire its own stock and thus complete its mutualization. There were two principal reasons for such recommendations:

(1) the elimination of the evils attendant upon the control of a large stock life insurance company by a single individual ~~or a clique of a few~~ individuals through ownership of a majority of the outstanding stock which bore an insignificant relation to the total resources of the company;

(2) to allow, in the spirit of justice and fairness, the policyholders to participate in the profits of the company.

See Committee's report, page 374 and pages 380-382.

Pursuant to such recommendations the Legislature added Section 95 to the then Insurance Law. See Section 31 of Chapter 326, Laws 1906. This new Section 95 provided for the acquisition by the company of its stock pursuant to a plan approved by a majority of its directors, of its stockholders and of its policyholders voting at the meeting and of the Superintendent of Insurance, thus assuring that all interested parties would have a voice in the formulation of the plan. Upon the plan being so approved the stock of the company was deemed retired and canceled. Thus the statute provided for compulsory

cancellation of the stock. Disapproving stockholders and policyholders were given the right of a judicial review.

In 1911 this Section 95 was materially amended by Section 2 of Chapter 150, Laws of 1911. Section 95 as so amended is set forth in the opinion of the Trial Court (pp. 8a-9a).

Inasmuch as this Section 95 did nothing of itself and inasmuch as the plan for the acquisition of its own stock by the company provided only for the purchase of stock from those stockholders who voluntarily elected to sell their stock at the price and on the terms provided in the offer being made by the company in the plan, it was necessary to amend Section 16 of the Insurance Law. Section 16 provided the kinds of stocks and bonds in which an insurance company could invest its surplus funds. One sentence in this section prohibited any investment in its own stock. By Section 1 of Chapter 150, Laws of 1911, this section was amended (see opinion of Trial Court, pp. 9a-10a). The amendment consisted of the addition of the words commencing with the word "provided" at top of page 10a.

By Section 1 of Chapter 301, Laws of 1917, this Section was further amended by adding after the 1911 amendment the provisions which now appear in subsection 3 of Section 199 after the first sentence thereof. See page 34a. Subsection 2 of this statute made certain amendments to Section 95 which for the purposes of the issues here are unimportant and immaterial.

In 1939 there was a general revision of the Insurance Law. See Chapter 882, Laws of 1939. Section 95 of the former Insurance Law is now subsection 2 of Section 199. The amendment to Section 16 of the former Insurance Law made in 1911 is now the first sentence of subsection 3 of Section 199 and the balance of this subsection 3 is the amendment made in 1917 to former Section 16.

The Trial Court in its opinion said:

> "Mutualization as an organic structural change was possible under the law as it stood when the Farmers and Traders was incorporated. It has not been changed in any way by any of the amendments since 1911. The same safeguards that existed in 1911 exist in 1959. The same steps must be taken as in 1911." (p. 10a)

The appellants in their brief in the Court of Appeals said at bottom of page 37 thereof:

> "The Legislature combined the pertinent provisions of former Sections 16 and 95 of the Insurance Law, as above stated, by the Laws 1939, Chap. 882, and the same is now Sec. 199 of the Insurance Law, • • •."

And at bottom of page 68:

> "• • • The changes made by Chap. 882 Laws of 1939 and Chap. 708, Laws 1955 now Sec. 199 do not basically change the principles involved and for the purposes of this litigation are substantially the same as the Laws of 1917."

It thus appears that the provisions in the plan of mutualization of Farmers and Traders for the acquisition of its own stock were pursuant to statutes in existence when the Company was organized.

The Questions Which Appellants in Their Notice of Appeal and Jurisdictional Statement State Are Presented by This Appeal Do Not Present a Substantial Federal Question

On pages 3 and 4 of their jurisdictional statement appellants list the three questions which they state are presented by this appeal. The same three questions are listed in the notice of appeal.

Question 1

Question 1 is not an interpretation of Section 2 of Section 199. It is appellants' present interpretation of the provisions in the plan of mutualization for the acquisition by the Company of shares of its own stock from such shareholders as voluntarily elect to accept the offer to buy made in the plan.

Subsection 2 in and of itself does nothing to the Company or its stockholders or its policyholders. It, as did Section 95 under the 1911 amendment, merely authorizes a domestic stock life insurance company which desires to become a mutual life insurance company to "formulate and carry out a plan for the acquisition by it of its outstanding capital stock, as follows: . . ." The price and terms upon which its stock was to be acquired were left entirely to the ability of the interested parties, directors, stockholders, policyholders and the Superintendent of Insurance, to reach an agreement. The plan authorized by subsection 2 of Section 199 (former Section 95) does not constitute a contract between the company and any of its stockholders. It merely is a continuing offer by the company to its stockholders to purchase shares of stock when, as and if any stockholder voluntarily elects to accept the offer. When any stockholder elects to accept the offer by surrendering his shares and accept the down payment and a mutualization certificate as provided in the plan, then a binding contract, a sale, is made between him and the company. This contract does not, in any way affect the rights of any other stockholder and cannot and does not constitute a taking of property.

The company becomes obligated to complete payments of the purchase price to the stockholder who elects to turn in his stock when and as the earnings from the nonparticipating business are realized. This is the proper

interpretation of the plan and the contract made when the stockholder elects to accept the offer made therein. This is the interpretation which appellants themselves placed upon the transaction in all their briefs in the courts of the State of New York. For example, on page 83 of their brief in the Appellate Division they state:

> "The Superintendent of Insurance under Sec. 199 (2) (f) and also the prior Law, Sec. 16, Chap. 150, Laws 1911 and Chap. 301, Laws 1917, was first required to determine that the surplus being used to buy stock was not required for the security of the then existing policyholders. Here, the Superintendent has made that determination and thus the purchase was proper."

On page 69 of their brief in the Court of Appeals:

> "Plaintiffs do not claim that the Company had no power to buy the stock."

Speaking of what resulted when the stockholders who had elected to accept the offer, did turn in their stock, they said on page 84 of their brief in the Appellate Division and repeated on page 70 of their brief in the Court of Appeals:

> "In any event, these stockholders who sold out, of course, cannot complain. They made a 'sale'. They were sufficiently warned by Plaintiff Young and the 'sale' was nevertheless acceptable to them. The 'sale' has been closed."

See subdivisions (a) to (m), (p), (q) and (u) of judgment.

The election to accept the offer contained in the plan to buy shares of stock being a matter which each stockholder had the right to elect, entirely at his own discretion, it was not necessary either for Section 199 or the plan to provide for any right of appraisal or judicial hearing.

The Trial Court in its opinion said:

> "Again this court reiterates that no stockholder is compelled to sell his stock under the provisions of section 199 of the Insurance Law. That is entirely in the discretion of the owner of the stock. There being no compulsory taking, there is no confiscation" (p. 15a).

As for those stockholders who of their own free will chose not to accept the offer in the plan but to retain their stock, they retained their shares with all the rights thereof as hereinbefore outlined.

Again we repeat that all stockholders of Farmers and Traders who ever acquired a share of stock acquired and held their shares subject to the constitutional right of the Company under statutes in existence when the Company was organized to switch from writing non-participating policies to writing participating policies and to make an offer to purchase its shares of stock from such stockholders as elected to accept the offer, all in the process of converting itself from a stock life insurance company to a mutual life insurance company in accordance with the declared public policy of the state.

There is no merit or substance to appellants' contention in their Question 1.

Question 2

At bottom of page 13 of their jurisdictional statement appellants admit that by the 1911 amendment of former Section 95 all compulsory requirements of the section (now subsection 2 of Section 199) were eliminated. They argue, however, that by the 1939 amendment to subsection 2 providing that if the plan specifies the purchase price to be paid by the company the price so specified should be adhered to, the compulsory features of the old 1906

statute were restored, thus forcing stockholders to sell their stock (see top p. 14a of appellants' jurisdictional statement). The Revision Note with respect to this amendment reads:

> "Subsection 2 is substantially the same as former §95, with a few changes. It seems desirable to have the price paid for shares either one fixed in advance and adhered to, or one approved by the superintendent as reasonable. Otherwise a few shareholders can practice a hold-up."

The simple and complete answer to the contention of appellants in this Question 2 is that the Court of Appeals of the State of New York has declared that under Section 199 and the plan of mutualization of Farmers and Traders each stockholder had the free and uncontrolled election to retain his shares or surrender them and be paid the mutualization price. See subdivisions (n) and (o) in declaratory judgment at page 21a. The contention appellants are now making is a pure afterthought because, as has heretofore been pointed out, the appellants in their brief in the Court of Appeals stated that subsections 2 and 3 of Section 199 were substantially the same as former Section 16 and 95.

Furthermore, as the cases presently to be cited will show, the amendment to Section 199 made in 1939 was certainly constitutional, authorized and valid under the reserved power of the Legislature to alter and amend charters.

Appellees also submit that the 1939 amendment that the mutualization price should be adhered to is beneficial, not harmful, to appellants. Keeping down the price to be paid to those stockholders who choose to sell their stock as provided in the plan means just so much more of the earnings from the non-participating business will be available for payment of dividends in which the appel-

lants will share on a pro rata basis so long as they elect to retain their stock.

There is no merit or substance to appellants' contentions in Question 2.

Question 3

This involves the 1917 amendment to Section 16 of the former Insurance Law, now everything in subsection 3 of Section 199 after the first sentence. In the plan of mutualization there are provisions (Articles V and VII) that the shares of stock purchased by the Company from the shareholders who elect to sell their stock shall be transferred into the name of the three named "Mutualization Trustees." This was done. The Mutualization Trustees have voted the shares so transferred into their names and have received dividends declared on these shares for the purposes stated in subsection 3 (I-447, 456, 462).

Such provisions of the mutualization plan and such acts are the only provisions and the only acts done by the appellees which are not pursuant to statutes in existence at the time Farmers and Traders was incorporated. In other words, except for this single item, all the provisions of the declaratory judgment rest upon an adequate non-federal basis. Appellees also maintain that the matters involved in Question 3 also rest on a non-federal basis, and, if this is not so, Question 3 certainly does not present a substantial federal question.

The arguments made and the cases cited on page 20 of appellants' jurisdictional statement present no federal or constitutional question. Whether the stock purchased by the Company pursuant to the plan becomes "treasury shares" in the sense that these shares could not be voted and no dividends could be paid thereon is purely a matter of New York statutory corporate law. By this 1917 amend-

ment the Legislature created a special kind of a voting trust. There could be no doubt that it had a right so to do and, having spoken, this special trust is legal. See *Matter of Morse (Bank of America)*, 247 N. Y. 290, at page 298.

The Court of Appeals of the State of New York has declared in the judgment appealed from that the transfer of the shares to the Mutualization Trustees is valid and effective, that said trustees have the right to vote the shares and receive dividends thereon for the benefit of policyholders entitled to share in the profits. See subdivisions (v), (w), (x), (y) and (z) of the judgment (pp. 24a-25a).

By presenting this Question 3 the real objective of the appellants is revealed. They seek complete control of this $40,000,000 company. The Company has 3,000 shares outstanding. On December 31, 1957, 2,784 shares (a few more since) had been transferred to the Mutualization Trustees. This left 216 shares not transferred. Of these plaintiffs own 157 shares. Plaintiffs are seeking a judgment that only these 216 shares can vote and receive dividends. That would put them in absolute control of the Company.

Such contention not only does the utmost violence to the unambiguous provisions of the 1917 amendment, but also to the entire spirit and purpose of the mutualization statutes. It is contrary to the declared public policy of New York State.

What did this 1917 amendment do to the shares of stockholders who elected to retain their shares? Not a thing. Each share of stock held by the appellants since the approval of the plan has exactly the same voting rights and the same rights to dividends and to share in the surplus of the Company as it had before the plan became effective. All the 1917 amendment did was to remove by express

language any possibility of a shareholder who elected not to turn in his shares successfully contending that his shares alone could vote and receive dividends.

Appellees therefore submit that, entirely apart from the constitutional right of the Legislature to adopt this 1917 amendment under its reserved power to amend, the amendment did not violate any constitutional rights of the appellants. A law which does not change by an iota rights is plainly constitutional.

The Trial Court based its decision holding that the 1917 amendment was not unconstitutional as to appellants on the ground that they had not proved that their shares had not come from the increased 1,000 shares authorized in 1919 (bottom p. 12a and top of p. 13a).

The Court in its opinion also held that under the constitutional and statutory reserved power in the Legislature to alter and repeal the charter of any corporation this 1917 amendment violated no constitutional rights of any stockholder of Farmers and Traders (see particularly top of p. 12a and bottom of p. 16a).

In the Court of Appeals appellees argued that, considering the legislative history and purposes of the mutualization statutes, a Court would have held that under the above-recited 1911 amendment to Section 16 the shares of stock acquired by the Company could have been voted and dividends received thereon. All that the 1917 amendment did was to make explicit what was implicit in the 1911 amendment.

Appellees therefore submit that even with respect to the voting of and receipt of dividends on the shares of stock acquired by the Company, the judgment appealed from rests on an adequate non-federal basis.

If this be not so, there cannot be the slightest doubt that under the reserved power to amend or repeal the

Legislature had the right to pass the 1917 amendment and such amendment violates no constitutional rights of the appellants.

The Revised Statutes, passed in 1827, provided that (1 R. S. 600, §8):

> "The charter of every corporation, that shall hereafter be granted by the Legislature, shall be subject to alteration, suspension and repeal, in the discretion of the Legislature."

That reservation now appears in Section 5 of the General Corporation Law, as follows:

> "§5. Alteration and repeal of charter.
>
> "The charter of every corporation shall be subject to alteration, suspension and repeal, in the discretion of the legislature."

The New York State Constitution, as adopted in 1846, and also as revised in 1894, provided that (N. Y. Const. of 1846, Art. 8, §1; N. Y. Const. of 1894, Art. 8, §1):

> "Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

The New York State Constitution still contains exactly the same provision, but now in Article 10, Section 1.

In addition to the cases cited in the opinion of the Trial Court we cite the following cases of this Court:

Sherman v. Smith, 1 Black 587, 17 L. Ed. 163.

Sherman was a stockholder of a bank incorporated in 1844 under the Banking Law of New York. The law then

provided that no stockholder of any bank should be liable for any of its debts. It also provided that the Legislature might at any time alter or repeal the act. In 1849 the Legislature passed an act making each stockholder liable ratably in proportion to his stock for the debts of the bank. This Court held the 1849 act constitutional.

Miller v. State of New York, 82 U. S. 478, 15 Wall. 478, 21 L. Ed. 98.

A railroad corporation was incorporated under an act passed in 1850. Power was given to the City of Rochester to elect four of the thirteen directors and to the other stockholders to elect the remaining nine. Later an act was passed giving the City of Rochester power to elect seven of the thirteen directors, with the other stockholders electing only six directors. Held, that the second act was constitutional under the reserved power in the Legislature to amend.

Looker v. Maynard, 179 U. S. 46, 21 Sup. Ct. 21.

Under the charter of the Michigan Mutual Life Insurance Company and the laws in existence at the time it was incorporated each qualified stockholder of the insurance company had one vote for each share of stock owned by him. Some fifteen years after it was incorporated Michigan, under the reserved power to amend, passed a law giving a shareholder the right to vote his shares cumulatively for directors. Held, the amending act was constitutional.

It should be noted that in each of the above cases the rights of the shareholders were drastically altered, whereas in the present case the rights of plaintiffs as stockholders of Farmers and Traders are not changed at all.

Appellees do not deem it necessary to comment on the cases cited by appellants other than to say that, in their opinion, none of such cases, except *Lord v. Equitable Life*

Assurance Society, 194 N. Y. 212, is in point. With such exception, none of appellants' cases is a case where (1) the plaintiff was a stockholder, (2) at the time of the incorporation of the corporation involved there were in existence statutes on the same general subject matter as the amending statute claimed to be unconstitutional, and (3) the amending statute, passed under the reserved power in the Legislature to amend, merely implemented or clarified the statute in existence at the time of incorporation.

In the *Lord* case the statute being attacked was one of the mutualization statutes adopted in 1906. It greatly diluted the voting power of the stockholders. It is now subsection 1 of Section 199. It was held constitutional. See pages 230-238 of 194 N. Y.

There is no merit or substance to appellants' contentions in Question 3.

The Court will note appellees pleaded several affirmative defenses (I 236-336). The State Courts did not find it necessary to pass upon these in view of the disposition which they made of appellants' case.

Appellees respectfully submit:

(1) That the appeal herein presents no substantial federal question;

(2) That the judgment appealed from rests on an adequate non-federal basis; and

(3) That the appeal should therefore be dismissed.

Respectfully submitted,

BENJAMIN E. SHOVE,
PHILIP T. SEYMOUR,

HANCOCK, DORR, RYAN & SHOVE,
800 Hills Building,
Syracuse 2, New York,
Attorneys for Appellees.

FILE COPY

Office Supreme Court, U.S.
FILED
DEC 12 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 526

EARL C. SYLVANDER, MARGARET C. SYLVANDER, FRED L. EAMES, S. H. TERRY and JOHN O. YOUNG, individually and on behalf of all other stockholders similarly situated,

Appellants;

FARMERS AND TRADERS LIFE INSURANCE COMPANY, LOUIS J. TABER, EDWIN W. HENNE, H. B. DOUST, HARRY A. CATON, ALVIN E. HANSON, GEORGE M. LEWIS, WALTER L. WEEDEN, D. EATON ALVORD, KENZIE S. BAGSHAW, BEATTY H. DIMIT, HARRY A. DUNSMOOR, FRED J. FREESTONE, CLARENCE E. JOHNCOX, JAMES B. KIRBY, B. BURDETTE LEE, GRANT T. LITTLE, HENRY D. SHERWOOD, BENJAMIN E. SHOVE, CLARENCE H. TWICHELL and HELEN E. HAYES, as Administratrix of Estate of Lester D. Hayes,

Appellees,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Intervenor-Appellee
80 Centre Street,
New York City
pro se

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

PHILIP WEINBERG
Attorney

Of counsel

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

SUBJECT INDEX:

	PAGE
Motion to Dismiss or Affirm	1
Opinions Below	2
Jurisdiction	2
Statute Involved	2
Brief	3

INDEX OF CASES CITED:

Application of Prudential Life Insurance Co., 132 N. J. Eq. 170, 28 A. 2d 120	
Belden v. Union Central Life Ins. Co., 143 Ohio St. 329, 55 N. E. 2d 629, app. dism. 323 U. S. 674	6
California Auto Ass'n v. Maloney, 344 U. S. 105	6
Garzo v. Maid of the Mist Steamboat Co., 303 N. Y. 516	8, 9
German Alliance Ins. Co. v. Lewis, 233 U. S. 389	6
Hinckley v. Schwarzschild & Sulzberger Co., 107 App. Div. 470 (1st Dept.), app. dism. 193 N. Y. 599	9
Minneapolis, St. P., & S.S.M. Ry. v. C. L. Merrick Co., 254 U. S. 376	10
O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U. S. 251	6
Ohio Nat'l Life Ins. Co. v. Struble, 82 Ohio App. 480, 81 N. E. 2d 622, app. dism. 150 Ohio St. 409, 82 N. E. 2d 856	6, 8
Ohio State Life Ins. Co. v. Clark, 274 F. 2d 771 (6 Cir.), cert. den. 363 U. S. 828	9
Royal Trust Co. v. Equitable Life Assur. Soc'y, 247 Fed. 437 (2 Cir.)	6
U. S. v. Carolene Products Co., 304 U. S. 144	9

INDEX OF STATUTES CITED:

PAGE

New York General Corporation Law § 5 4

New York Insurance Law § 16 ..... 4, 6

New York Insurance Law § 95 ..... 4, 6

New York Insurance Law § 199 ..... 2, 3, 4, 6, 7, 8, 9, 10

INDEX OF CONSTITUTIONAL PROVISIONS CITED:

U. S. Constitution, Art. I § 10 4

U. S. Constitution Amendment XIV 4

INDEX OF DOCUMENTS CITED:

Annual Report, New York Superintendent of Insurance, March 1, 1917 8

Report of Armstrong Committee, N. Y. Ass. Doc. No. 41 (1906) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 529

EARL C. SYLVANDER, MARGARET C. SYLVANDER, FRED L. EAMES, S. H. TERRY and JOHN O. YOUNG, individually and on behalf of all other stockholders similarly situated,

Appellants,

v.

FARMERS AND TRADERS LIFE INSURANCE COMPANY, LOUIS J. TABER, EDWIN W. HENNE, H. B. DOUST, HARRY A. CATON, ALVIN E. HANSON, GEORGE M. LEWIS, WALTER L. WEEDEN, D. EATON ALVORD, KENZIE S. BAGSHAW, BEATTY H. DIMIT, HARRY A. DUNSMOOR, FRED J. FREESTONE, CLARENCE E. JOHNCOX, JAMES B. KIRBY, B. BURDETTE LEE, GRANT T. LITTLE, HENRY D. SHERWOOD, BENJAMIN E. SHOVE, CLARENCE H. TWICHELL, and HELEN E. HAYES, as Administratrix of Estate of Lester D. Hayes,

Appellees,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee.

On Appeal from the Court of Appeals of the State of New York.

MOTION TO DISMISS OR AFFIRM

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, appellee herein, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves this court to dismiss or affirm with costs the appeal taken herein to this court by Earl C. Sylvander, *et al.*, appellants, upon the ground that there is no substantial federal question involved.

Dated: New York, N. Y., December 8, 1960.

LOUIS J. LEFKOWITZ,
Attorney General of the State
of New York,
Appellee *pro se*.

Opinions Below

The opinion of the New York Supreme Court, Onondaga County, dismissing the complaint herein, is reported in 19 Misc. 2d 1005, 188 N.Y.S. 2d 368.

The Appellate Division, Fourth Judicial Department, and the New York Court of Appeals, affirmed without opinion. The decision of the Appellate Division is reported in 9 A. D. 2d 1019, 196 N.Y.S. 2d 592. The Court of Appeals' judgment is annexed to appellants' jurisdictional statement at pages 28a-30a.

Jurisdiction

This is an appeal from a judgment of the Court of Appeals of the State of New York, dated May 19, 1960, which unanimously affirmed a judgment of the Appellate Division of the Supreme Court, Fourth Judicial Department, dated January 6, 1960, which had affirmed a judgment of the Supreme Court, Onondaga County, dated May 7, 1959, dismissing the complaint herein. Appellants contend this Court has jurisdiction on the ground that substantial constitutional questions are presented. Appellees respectfully contend that such issues are insubstantial and utterly devoid of merit.

Statute

The statute involved in this appeal is § 199 of the Insurance Law of the State of New York.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL OR AFFIRM

Appellants appeal from a judgment of the Court of Appeals of the State of New York which unanimously affirmed a judgment of the Appellate Division of the Supreme Court, Fourth Judicial Department, which had affirmed a judgment of Onondaga County Supreme Court, dated May 7, 1959, dismissing the complaint herein. This is an action for a judgment declaring invalid a plan under which appellee Farmers & Traders Life Insurance Co. (herein called "Farmers") sought to convert from a stock to a mutual insurance company, and the statute authorizing such a plan.

Since appellants' complaint alleged the unconstitutionality of a statute, Insurance Law § 199*, the Attorney General intervened by consent on December 17, 1958.

Introduction

Appellants own 157 shares of stock in Farmers, which was incorporated in 1912 and has 3000 shares outstanding. The shares held by appellants were purchased since 1934 at the earliest. On May 15, 1954 the directors voted to convert Farmers from a stock to mutual company pursuant to Insurance Law § 199. As required by that statute, the plan was approved by a majority of the shareholders at a meeting on July 19, 1954, and by a majority of the policyholders voting at a meeting on August 31, 1954. The New York State Superintendent of Insurance approved the plan after a complete investigation and after affording counsel for appellants ample opportunity to be heard in opposition to the plan.

---

* Unless otherwise specified, all statutory references are to the New York Insurance Law.

Thereafter three voting trustees were appointed, pursuant to § 199, subd. 3, and all shares turned in under the plan were conveyed to them. These amounted to 92% of the total shares. Each shareholder turning in his stock received a "mutualization certificate" for the value of each share, to be paid out of the accumulated net earnings of the company's non-participating business. Each payment required the approval of the Superintendent of Insurance.

State Proceedings

Appellants' complaint alleged seven causes of action, of which two involved questions arising under the United States Constitution, as follows:

(1) that § 199 unconstitutionally impairs the obligation of contracts (Art. I, § 10); and

(2) that § 199 acts as a deprivation of property without due process of law and as a denial of the equal protection of the laws (Amend. XIV).

The opinion of the Onondaga County Supreme Court (*McClusky*, J.), annexed to appellants' jurisdictional statement at pages 1a-17a (reported 19 M. 2d 1005), extensively discussed the law applicable to the contentions here at bar, and found no impairment of any contractual obligation or violation of the Fourteenth Amendment. The Court noted that former Insurance Law §§ 16 and 95, the direct predecessors of § 199, which were in force prior to the existence of Farmers, authorized mutualization, and that General Corporation Law § 5 empowers the Legislature to alter, suspend or repeal the charter of every corporation. It went on to hold (Jur. Statement, p. 12a), referring to § 199:

> "There is nothing abhorrent in such a provision. Subsequently the law was amended to provide more in detail how the stock was to be handled pending

final mutualization. The general prohibition in the first part of the section was limited by the proviso. Evidently the Legislature recognized the existence of a potential problem and tried to meet it. At its worst it was a provision relating to the internal management of the corporation and, therefore, particularly subject to legislative alteration. By no stretch of the imagination did it constitute an impairment of any contract between the State and the corporation or its stockholders."

As the Court held, the law in effect at the time the stock was issued contained "the seeds of mutualization", Jur. Statement, page 13a, and therefore no existing contractual obligation could conceivably have been impaired.

Appellants' contentions based on the due process clause were similarly found to be unworthy of consideration. The court held (Jur. Statement, p. 14a):

> "No stockholder in an insurance company is under any illusion. He knows or should know that his stock may be mutualized by the very law which gave the insurance company being. The enactment of amendments to the statute did not impair any contract with the corporate entity or the stockholders."

On appeal, the judgment of the Supreme Court was affirmed unanimously, without opinion, by the Appellate Division, Fourth Judicial Department, and by the New York Court of Appeals.

No Substantial Federal Question is Involved in the Instant Appeal; Nor is There Any Substantial Merit

Appellants assert that three questions are presented by this appeal. (Jur. Statement, pp. 3-4.) It is submitted that none present issues under the Constitution of a nature

substantial enough to warrant any further consideration by this Court.

The due process contention of appellants that § 199 is violative of the Fourteenth Amendment in that it authorizes a mutualization plan depriving dissenting shareholders of their property is without merit. Ever since *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, it has been clear beyond cavil that the insurance industry affects the public interest to an extent justifying regulatory legislation of a far-reaching nature. Cf. *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251; *California Auto. Ass'n* v. *Maloney*, 344 U. S. 105, 109.

The statute here challenged was enacted in 1906 after lengthy hearings by the Armstrong Committee, which was investigating abuses in the field of life insurance. The committee concluded the policyholders, with a far greater financial stake than shareholders, should be awarded a commensurate voice in management through voluntary mutualization. Proposals for compulsory mutualization were rejected, the committee believing the preferable course to be voluntary conversion with "[s]uitable safeguards • • • so that the plan of retirement should not deprive any stockholder of property without his consent • • •." Report of Armstrong Committee (N. Y. Ass. Doc. No. 41 [1906]).

The New York statute, formerly § 95 and now § 199, has been the prototype of similar provisions in 17 other jurisdictions, all of which have been upheld as constitutional whenever challenged. See, e.g., *Belden* v. *Union Central Life Ins. Co.*, 143 Ohio St. 329, 55 N. E. 2d 629, app. dism. 323 U. S. 674; *Ohio National Life Ins. Co.* v. *Struble*, 82 Ohio App. 480, 81 N. E. 2d 622, app. dism. 150 Ohio St. 409, 82 N. E. 2d 856; *Application of Prudential Life Ins. Co.*, 132 N. J. Eq. 170, 28 A. 2d 120.

Moreover, the constitutionality of §§ 16 and 95, the predecessors of § 199, was sustained in *Royal Trust Co.* v. *Equitable Life Assur. Soc'y*, 247 Fed. 437 (2nd Cir.).

Appellants' further contention (Jur. Statement, p. 4) calls into question a 1939 amendment to § 199 which requires the price fixed by the mutualization plan to be adhered to. The assertion that this somehow impairs contractual obligations was never made below and is a mere afterthought pressed for the first time here. While this is reason enough to disregard the argument, it should be noted that appellants conceded in their brief in the Court of Appeals, at page 68, that "[t]he changes made by Ch. 882 Laws of 1939 and Ch. 708 Laws of 1955 now § 199 do not basically change the principles involved *and for the purposes of this litigation are substantially the same as the Laws of 1917*" (emphasis added).

Further, the amendment complained of does not injure appellants since, as the courts below found, the plan does not compel any shareholder to sell his interest. It merely acts to prevent a small group of dissidents from refusing to sell and then extorting a disproportionate sum for its shares—a legislative purpose valid beyond cavil.

The final question asserted by appellants to merit this Court's consideration concerns the 1917 amendment of former § 95, presently § 199, subd. 3. This change authorized the transfer of shares acquired by a company under a mutualization plan to three voting trustees named in the plan and approved by the Superintendent of Insurance, who are empowered to vote the stock and to receive dividends in trust for the benefit of the policyholders. Appellants contend this provision impairs contractual obligations and deprives dissenting shareholders of their property without due process of law (Jur. Statement, p. 4).

The stock owned by appellants was purchased long after 1917, so it is difficult to see what right was impaired. It is manifest that shares are issued subject to any existing law, and appellants, or their predecessors in interest, had constructive or actual knowledge of the statute they now assail. *Ohio National Life Ins. Co.* v. *Struble, supra; Garzo* v. *Maid of the Mist Steamboat Co.*, 303 N. Y. 516, 523.

Moreover, as the court below found, the record is barren of proof that appellants' shares were even *issued* prior to 1917. Therefore no possible right of appellants could conceivably have been invaded by the 1917 statute.

The necessity for the amendment in issue is amply demonstrated by the Annual Report of the New York Superintendent of Insurance, March 1, 1917, at page 13:

> "• • • no stockholder could be compelled to surrender his stock for cancellation, and accept the price provided in the plan, if he saw fit not to do so. It is therefore possible, under the present law, for a dissenting or unwilling stockholder, owning but a small portion of the outstanding stock, providing the greater portion has been retired under the plan, to absolutely control the company."

This provision impairs appellants' voting rights in no way, since before the plan they had 157 votes out of 3,000, and this they still have. Their objection appears to be that the statute denies them a controlling interest to which they are not entitled. The voting trust procedure was enacted to prevent the very result appellants demand. It is difficult to see how a statute which does not alter one's position with respect to the company may impair one's "vested rights".

It is to be noted that Farmers had the power to enfranchise its policyholders pursuant to § 199, subd. 1, a provision antedating the incorporation of the company, originally enacted in 1909. This would, of course, have diluted appellants' voting rights *pro tanto*. Yet it was not done.

Furthermore, it is clear that a mere change of detail or procedure may not act as an impairment of vested rights so long as the substance of the statute existed prior to incorporation. *Garzo* v. *Maid of the Mist, supra; Hinckley* v. *Schwarzschild & Sulzberger Co.*, 107 App. Div. 470 (1st

Dept.), app. dism. 193 N. Y. 599. The court there held, at page 478:

> "• • • [A]cts which do no more than regulate and control the internal management of a corporation, so far as it has relation to the public and concerns the power of the State, are within the power to alter and reveal, even though the exercise of the power adds to the burden of the stockholder by increasing his liability, or diminishes the value of his stock, or changes the name, offices or proportion in management and control of the corporation. Within this rule must necessarily fall the right to change the capital stock of the corporation as to amount, kind and classification."

It is manifest that the Constitution offers no guarantee of absolute protection from legislative changes in corporate structure. It is to be presumed, moreover, that the Legislature inquired and found the need for the regulatory statute in question. *U. S.* v. *Carolene Products Co.*, 304 U. S. 144. And the record is replete with proof that the enactment of the statutes at bar was the result of exhaustive inquiry. It is clear that no violation of the due process or impairment of contract clauses has been shown.

The cases relied on by appellants are inapposite. *Ohio State Life Ins. Co.* v. *Clark*, 274 F. 2d 771 (6 Cir.), cert. den. 363 U. S. 828, cited in support of appellants' arguments, concerned a statute, enacted subsequent to the purchase of insurance policies, which permitted shareholders to obtain beneficial ownership of the company's surplus. The court there concluded this was an impairment of the policyholders' vested rights. Here, however, appellants are being deprived of nothing through the operation of § 199. They are not compelled to convey their shares, as is the law in Ohio, New Jersey, and other states. Nor are their voting rights affected by the conveyance of other shares to the trustees.

This court has held that its jurisdiction does not extend to cases raising questions foreclosed by previous decisions. See, e.g., *Minneapolis, St. P. & S. S. M. Ry.* v. *C. L. Merrick Co.*, 254 U. S. 376. The law is settled as to each of appellants' contentions, and no merit exists as to any.

It is manifest that appellants fail to set forth any substantial ground for attacking the validity of § 199. Therefore we respectfully urge that this appeal be dismissed.

CONCLUSION

The appeal should be dismissed, or affirmed, with costs.

Dated: New York, N. Y., December 8, 1960.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Intervenor-Appellee
pro se

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

PHILIP WEINBERG
Attorney
Of counsel

ILE COPY

FILED
DEC 27 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 529

EARL C. SYLVANDER, MARGARET C. SYLVANDER, FRED L. EAMES, S. H. TERRY and JOHN O. YOUNG, individually, and on behalf of all other stockholders similarly situated,

Appellants,

vs.

FARMERS AND TRADERS LIFE INSURANCE COMPANY, LOUIS J. TABER, EDWIN W. HENNE, H. B. DOUST, HARRY A. CATON, ALVIN E. HANSON, GEORGE M. LEWIS, WALTER L. WEEDEN, D. EATON MAYORD, KENZIE S. BAGSHAW, BEATTY B. DIMIT, HARRY A. DUNSMOOR, FRED J. FREESTONE, CLARENCE E. JOHNSON, JAMES B. KIRBY, B. BURDETTE LEE, GRANT T. LITTLE, HENRY D. SHERWOOD, BENJAMIN E. SHOVE, CLARENCE H. TWICHELL and HELEN E. HAYES, as Administratrix of Estate of Lester D. Hayes,

and

Appellees,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY TO MOTIONS TO DISMISS APPEAL

Joseph W. Burns,
AUSTIN, BURNS, APPELL & SMITH,
535 Fifth Avenue,
New York 17, New York,

Laurence Sovik,
SMITH AND SOVIK,
300 Wilson Building,
Syracuse 2, New York,
Attorneys for Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

EARL C. SYLVANDER, MARGARET C. SYLVANDER, FRED L. EAMES, S. H. FERRY and JOHN O. YOUNG, individually and on behalf of all other stockholders similarly situated,

Appellants,

v.

FARMERS AND TRADERS LIFE INSURANCE COMPANY, LOUIS J. TABER, EDWIN W. HENNE, H. B. DOUST, HARRY A CATON, ALVIN E. HANSON, GEORGE M. LEWIS, WALTER L. WEEDEN, D. EATON ALVORD, KENZIE S. BAGSHAW, BEATTY H. DIMIT, HARRY A. DUNSMOOR, FRED J. FREESTONE, CLARENCE E. JOHNCOX, JAMES B. KIRBY, B. BURDETTE LEE, GRANT T. LITTLE, HENRY D. SHERWOOD, BENJAMIN E. SHOVE, CLARENCE H. TWICHELL and HELEN E. HAYES, as Administratrix of Estate of Lester D. Hayes,

Appellees,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee.

No. 529

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY TO MOTIONS TO DISMISS APPEAL

The motion of the appellees to dismiss and the motion of the intervenor to dismiss or affirm are not supported by any factual or legal argument that appellants' points are

without substance or that the decision below is based on an adequate non-federal ground. Both motions are more in the nature of briefs on the merits, arguing that the lower court decision was correct.

1. *The issue is not whether Section 199 of the New York Insurance Law could constitutionally authorize mutualization over the objection of dissenting stockholders, but whether its failure to provide for an independent appraisal of the value of the dissenting stockholder shares and judicial review thereof is unconstitutional.*

Appellees contend (p. 15) that Section 199 "in and of itself" does nothing to the stockholders. Courts rarely decide the constitutionality of a statute *in vacuo*. The question is generally the *application* of the statute. In *Diocese of Rochester* v. *Planning Board*, 1 N. Y. 2d 519, 521; 154 N. Y. S. 2d 849, 857, the court stated: "An ordinance, constitutional on its face (or deemed so) may be construed and applied in an unconstitutional manner. If the construction of an ordinance as applied to a particular piece of property and a particular set of facts is so arbitrary and unreasonable as to result in an invasion of property rights, the action of the zoning board thereunder will be invalidated."

It is possible that plans of mutualization might be devised which do not deprive stockholders of constitutional rights. The question is whether the failure of the New York statutes to provide for an appraisal or judicial review is substantial and warrants review by this Court.

The statement by the intervenor (p. 6) that the New York statute has been the prototype of similar provisions in 17 other jurisdictions is misleading, if not plainly erroneous. As stated in appellants' Jurisdictional Statement (p. 9) eight of the 17 other states provide for an

appraisal or judicial review to determine the fair value of the shares of dissenting stockholders. A very substantial question justifying review by this Court is the split among these states on this issue.

The cases cited by the intervenor at page 6 do not support his contention that similar provisions have been upheld as constitutional in other states.

In *Belden* v. *Union Central Life Ins. Co.*, 143 Ohio St. 329, 55 N. E. 2d 629, app. div. 323 U. S. 674, the action was brought not by a stockholder but by a policyholder. The court, citing, inter alia, the section of the Ohio Code giving the dissenting stockholders a right of appraisal (unlike the New York statute), upheld the statute as constitutional on its face *but said that a statute constitutional on its face nevertheless could be unconstitutional in its operation on a particular state of facts.* The court held the policyholders did not show this because they had no vested right in the organizational structure of the stock insurance company, since such right existed only in the stockholders. In the *Belden* case, therefore, it was a question of an improper person raising the constitutional question.

The case at bar is clearly distinguishable on two grounds: (1) that it is stockholders who are contesting the constitutionality of the statute and (2) New York does not give a right of appraisal.

Ohio Nat'l. Life Ins. Co. v. *Struble*, 82 Ohio App. 480, 81 N. E. 2d 622, app. dis. 150 Ohio St. 409, 82 N. E. 2d 856, cited by the intervenor, which also involved the Ohio statute, was brought by stockholders. Although they made four contentions, only one involved a constitutional question, i.e., impairment of contracts. The court concluded that the amendment made subsequent to their stock acquisition merely changed the procedure for dissenting stock-

holders to obtain the fair cash value of their stock, and thus did not affect vested rights. The stockholders thus did not raise the question of due process of law at all. Here the question has been raised, and this Court should determine whether the amendments to the New York statute affected vested rights.

In *Application of Prudential Insurance Co.*, 132 N. J. Eq. 170, 28 A. 2d 120, a policyholder objected to the mutualization. The court at 132 N. J. Eq. 176 had this to say in answer to his objection:

> "Nor does the legislation violate the due process clause of the federal constitution by failing to establish a reasonable measure for determining the fair value at which the shares may be purchased for retirement for the purpose of complete mutualization. The contrary seems to be true and the statute presents two methods; the one, as here by bargaining resulting in a contract, the execution of which is subject to the approval of the Chancellor, *and, the other, an appraisal to be instituted by the owners of the outstanding stock, such appraisal likewise being subject to inquisition and approval by the Chancellor.* The rights of the policyholders are fully protected by the legislative mandate." (Italics supplied.)

According to the court, therefore, in the *Prudential* case, the stockholders had the right of appraisal subject to judicial review which they do not have in this case and it is the appellants' contention that the absence of such right violates due process of law.

It is worth noting also that in that case the last remaining 536.76 stockholders who refused to sell at the appraised value of $455 per share were able to negotiate a sale of the stock to the company at $1500 per share.

This amount could never be realized under the New York statute because there, once the value is set, it must be adhered to. It is no longer a voluntary negotiation but a compulsory one without the corresponding right of appraisal.

The issue is not whether a state has the *power* to amend or repeal legislation, and thus affect corporate charters. The issue is whether in the exercise of such power a state may deprive stockholders of vested property rights. The substantial question is whether vested property rights were affected in this case.

Appellees statement (p. 17) that the Company was authorized under the statute to change from a non-participating to a mutual company does not define the issue. Statutes generally permit a company to merge with another, and lose its identity, but in such case a dissenting stockholder has a right to have the value of his stock determined subject to judicial review.

Appellees description (p. 15) of the plan of mutualization as merely a "continuing offer" of the company to purchase the stock of dissenting stockholders is not a correct description of the plan. The *purpose and effect* of the plan is to eliminate completely all assets of the company applicable to the common stock. The company has proceeded to do just that, and intends to set aside $1,000 and nothing more to pay for each share of stock whenever the stockholder gives up the fight. A share can never be worth more than $1,000, as eventually there will not be any non-participating policies or dividends. It *hopes* to accumulate the $1,000 during a 10 year period, but may never do so.

The contention of the intervenor (p. 7) that the 1939 amendment merely acts to prevent dissenting stockholders from "exporting a disproportionate sum" for their shares does not answer the question, but rather poses it. The real

question is WHO determines what is a proportionate sum, the directors of the company, or a disinterested administrative or judicial body. The whole basis of statutes providing for appraisal and judicial review is to authorize a court to determine the fair value, in order to prevent a majority from being arbitrary.

2. *In determining whether review should be granted, this Court is concerned with legal rights not extraneous motives of the parties.*

The *ad hominem* argument of appellees (p. 20) relating to what they consider the "real objective" of appellants is irrelevant. To be objective in their argument, appellants purposely avoided referring in their Jurisdictional Statement to appellees' desire to perpetuate themselves as salaried officers of the company, without owning a share, and with no investment of their own funds.

Appellants believe the questions presented are substantial and should be reviewed by this Court.

Respectfully submitted,

Joseph W. Burns,
AUSTIN, BURNS, APPELL & SMITH,
535 Fifth Avenue,
New York 17, New York,

Laurence Soyik,
SMITH AND SOVIK,
300 Wilson Building,
Syracuse 2, New York,

Attorneys for Appellants.